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THE DARTMOUTH COLLEGE CASE AND THE CHICAGO TRACTION PRO

NORTHWESTERN UNIVERSITY

Evanston—Chicago

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QUARTERLY BULLETIN OF THE SCHOOL OF LAW

UNIVERSITY OF ILLINOIS

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MEMBER OF THE ASSOCIATION
OF AMERICAN LAW SCHOOLS

THE STREET RAILROAD PROBLEM IN CHICAGO

ITS SOLUTION MUST BE SOUGHT UNDER THE SETTLED LAW OF ILLINOIS,
AND NOT UNDER THE DOCTRINE OF THE DARTMOUTH
COLLEGE CASE, OR UNDER THE PRINCIPLE AND
POLICY OF MUNICIPAL OWNERSHIP.

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During the past eight years the principal street railroad corporations of Chicago, the Chicago City Railway Company and the Chicago Union Traction Company, have been seeking an extension or renewal of their franchises at the hands of the city council. They have not yet got the extension or renewal, and perhaps a majority of the electors of Chicago are opposed to the granting of street railroad franchises by the city council.

1. WHAT IS A STREET RAILROAD FRANCHISE GRANTABLE BY THE COUNCIL OF CHICAGO?

What is a street railroad franchise grantable by the council of Chicago, and what is there about it to make some people want to get the thing so badly and to make other people so strongly oppose their getting it?

Blackstone, speaking of franchises, says: "Franchise and liberty are used as synonymous terms, and their definition is, a royal privilege, or branch of the king's prerogative, subsisting in the hands of a subject. Being, therefore, derived from the crown, they must arise from the king's grant" (2 Com., 37). He classes franchises as "incorporeal hereditaments," whose existence, he says, "is merely in idea and abstracted contemplation; though their effects and profits may be, frequently, objects of our bodily senses" (2 Com., 20).

If we strike out of Blackstone's definition the words "king," "crown," "royal" and "subject," and substitute therefor "people of Illinois" and "citizen," Blackstone's definition of a franchise is good to-day in Illinois, and will read thus: "Franchise and liberty are used as synonymous terms; and their definition is, a privilege of the people of Illinois, or branch of the prerogative of the people of Illinois, subsisting in the hands of a citizen. Being, therefore, derived from the people of Illinois, they must arise from that people's grant."

In the case of *California v. Central Pacific Railroad Company*, 127 U. S., 1, 40, Mr. Justice Bradley, speaking for the Supreme

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Court of the United States, said: "What is a franchise? * * * Generalized and divested of the special form it assumes under a monarchical government based on feudal traditions, a franchise is a right, privilege or power of public concern, which ought not to be exercised by private individuals at their mere will and pleasure, but should be reserved for public control and administration, either by the government directly or by public agents, acting under such conditions and regulations as the government may impose, in the public interest, and for the public security. Such rights and powers must exist under every form of society. They are always educed by the laws and customs of the community. Under our system, their existence and disposal are under the control of the legislative department of the government, and they cannot be assumed or exercised without legislative authority. No private person can establish a public highway, or a public ferry, or railroad, or charge tolls for the use of the same, without authority from the legislature, direct or derived. These are franchises. No private person can take another's property, even for a public use, without such authority; which is the same as to say, that the right of eminent domain can only be exercised by virtue of a legislative grant. This is a franchise. No persons can make themselves a body corporate and politic without legislative authority. Corporate capacity is a franchise. The list might be continued indefinitely."

The right to occupy public streets and other public grounds with railroad track is a franchise (*Davis v. Mayor of New York*, 14 N. Y., 506, 523; *New Orleans, etc., R. Co. v. Delamore*, 114 U. S., 501, 507; see, also, *Memphis and Little Rock R. Co. v. Railroad Commissioners*, 112 U. S., 609, 619; *Louisville, etc., R. Co. v. State Board of Assessors*, 55 N. J. Law, 529, 537).

In order that private citizens may carry on the business of constructing and operating street railroads over and along public streets in Chicago, as a corporation, they must obtain several different kinds of franchises, or special privileges, or powers. They must get first the franchise *to be* a corporation; that is to say, the right of a collective and changing body of men to act as an individual (*Providence Bank v. Billings*, 4 Peters, 514, 562). This franchise *to be* a corporation belongs to the natural persons who compose the corporation and not to the corporation itself. The franchises which belong to the corporation grow out of the power, or capacity, conferred upon the corporation *to do things* that a natural person gets the capacity or power to do from his Creator; that is to say, in the case of a street railroad corporation, to construct the railroad, to operate cars over it, and to take tolls or fares from the people carried. But these corporate powers or fran-

chises, when granted, so far as street railroad corporations are concerned, exist only "in abstracted contemplation," until the power or franchise to enter upon and use public streets is obtained. When this latter franchise is obtained, the effects of a use of the other franchises, or powers, become immediately "objects of our bodily senses" in the shape of iron rails, street cars, conductors, motormen and all the other paraphernalia of a going street railroad.

It has always been, and is now, one of the powers, liberties, privileges or prerogatives of the people of Illinois to do the work of carrying people in street cars over and along the streets of Chicago either directly, or by a delegation of the power, liberty, privilege or prerogative to the people of Chicago, with street railroads owned by the people, and operated by their own officers and employes (16 Harv. Law Rev., 172, and case cited). Hitherto they have not used that power, liberty, privilege or prerogative, simply because a majority of the electors of the whole State and of Chicago have been of the opinion that they could get the work done better by granting that power, liberty, privilege or prerogative to private individuals, associated together as a corporation, requiring them to use it with material property owned by themselves and operated by their own officers and employes, and allowing them to get their pay or compensation out of the fares paid by the people carried.

A street railroad franchise in Chicago grantable by the council is, and always has been, therefore, only that power, liberty, privilege, or prerogative of the people of Illinois to carry passengers for hire over and along the streets of Chicago by means of street railroads, subsisting in the hands of private individuals under and by virtue of a grant made by the people of Illinois. A street railroad franchise is just like a public office in this: the holder of it enjoys the privilege of wielding a portion of the sovereign power of the people of Illinois, and of using a portion of their property, the public streets, *in trust* for the ultimate benefit of the people. But, instead of furnishing the holders of a street railroad franchise with all the material property necessary to enable them to use it beneficially, and paying them for their services out of the public treasury, the people of Illinois require them to get the necessary material property, except the public streets, with their own money, and to earn their pay or compensation out of the fares paid by the people carried.

II. THE 'CONSTITUTIONAL MODES OF MAKING GRANTS OF STREET RAILROAD FRANCHISES IN ILLINOIS PRIOR TO, AND AFTER, AUGUST 8, 1870.

August 16, 1858, marks the introduction of street railroads in

Chicago (199 Ill., 488). Illinois was then organized under her second State Constitution, in force April 1, 1848, which was superseded by the present State Constitution, in force August 8, 1870 (Hurd's R. S., 1903, p. 37; p. 53). Neither of those Constitutions, nor any statute passed in pursuance thereof, except the Mueller Act of 1903, uses the word "franchise" as that word is used every day in Chicago, but describe the same thing as the right to lay down and use street railroad tracks in public streets, the right of user consisting of the right to operate street cars over and along the tracks, to carry people in them and to exact tolls or fares from the people carried.

Under the Constitution of 1848 the people of Illinois, acting in their State Legislature, had the power either to make a direct grant of the right, or to authorize a municipal corporation to make such grant.

But under the present Constitution the State Legislature has no power to make a direct grant of the right, and can only authorize municipal corporations to make the grant. Article XI, Section 4, of that Constitution says: "No law shall be passed by the General Assembly granting the right to construct and operate a street railroad within any city, town or incorporated village, without requiring the consent of the local authorities having the control of the street or highway proposed to be occupied by such street railroad."

This provision makes the operation and management of street railroads in Chicago a subject or object exclusively of local government. Under this provision it is very clear that all that a number of individuals combined together in a corporation to own and operate a street railroad over and along the streets of Chicago can get from the people of Illinois, acting in their State Legislature, is the bare power to carry on the business as a corporation. In 1899 the State Supreme Court said: "While it is true the charter of a street railway corporation is granted under the general laws of the State, yet a charter so obtained gives but the bare power to exist. In order to enable such a corporation to carry out the sole purpose for which it has existence, it must have a further exercise of sovereign power in its behalf. Some city or village clothed, by delegation, with authority to exercise sovereign power possessed by the State, must grant such corporation authority to enter upon its streets and alleys and construct and operate its road there" (*The People v. Suburban R. Co.*, 178 Ill., 594, 605).

The city council of Chicago is the local authority in Chicago having control of the streets of Chicago. The right, liberty, privilege, franchise, or prerogative, or whatever else one may choose to

call it (but being, as above stated, in the last analysis, only the special privilege, created, and bestowed upon private individuals, by some competent authority chosen by the people, of doing work the people can do themselves by their own officers and employes whenever a majority of the electors want to), to lay down and use street railroad tracks in the streets of Chicago is, therefore, under the present law of Illinois, obtainable only by a grant made by the city council of Chicago, and the making of such grant is an exercise, by the city council, of the sovereign power of the people of Illinois, delegated to it, for purposes of local government, by the Constitution and Legislature of the State.

III. STREET RAILROAD FRANCHISES AND CABMEN'S LICENSES.

Obviously, so far, what is commonly called in Chicago a street railroad franchise differs in no material respect from what is commonly called a cabman's license. Such a license is but a grant by the city council of Chicago, under a power delegated to it by the State Legislature, of the right or privilege to carry people in cabs over and along the streets of Chicago, and to take tolls or fares from the people carried. It is the law of Illinois, and always has been, that street railroad companies and cabmen pursue like occupations. The State Supreme Court has said: "The only distinction which can be called substantial between the two classes of occupation is that one carriage goes upon iron rails, in a regular track, with wheels, and the other carriage goes with wheels upon the ordinary street way" (*Allerton v. Chicago*, 6 Fed. Rep., 555; *Union Traction Co. v. Chicago*, 199 Ill., 484, 517 to 522).

But the word "license" at once raises in the mind of every one the thought that it is revocable, and certainly will be revoked, at least for good cause, by the city council, so no one is afraid to let the city council of Chicago grant a license to a cabman. The word "franchise," however, at once raises in the mind of nearly every one the thought that it is irrevocable by the city council, and that thought is confirmed by the fact that no one has ever heard of the city council of Chicago revoking a franchise of a street railroad company even for a good cause, though occasions for exercising the power have not been wanting, as every one in Chicago knows. And so very many think that the city council of Chicago should not be allowed to grant a street railroad franchise for a fixed term of years.

IV. THE CONCEPTION OF THE IRREVOCABILITY, BY LEGISLATIVE ACT, OF A STREET RAILROAD FRANCHISE.

Right there, in that thought that a street railroad franchise, once granted for a fixed term of years, and accepted, is irrevocable by the city council of Chicago at any time and for any cause be-

fore the expiration of the fixed term of years, lies the peculiar charm to some, and the peculiar odium to others, of a street railroad franchise. Is that thought correct?

It is, no doubt, true that, in England, before and at the time Blackstone wrote his definition of a franchise as being a branch of the king's prerogative, subsisting in the hands of a subject, under a royal grant, *the king* could not revoke a franchise granted by him unless he expressly reserved the right so to do in the grant. But *the people of England, assembled in Parliament*, always could revoke the king's grant, and their own grant as well, and can do it to-day, whenever a majority of them make up their minds the thing ought to be done (8 Am. Law Rev., 189). A few years after Blackstone wrote they began to talk about revoking the franchises of the great East India Company, and finally did it, after some fifty years or more of discussion (May's Constitutional History of England, Vol. II, pp. 540-546; New York, 1874, W. J. Widdleton, Publisher).

In the United States, in 1819, in the famous Dartmouth College case (4 Wheaton, 518), the Supreme Court of the United States extended the English doctrine of irrevocability by the king to a grant of a franchise made by the people of a State in this Union, assembled in their State Legislature, and, in consequence, held a grant of a franchise made by one State Legislature, and accepted by the grantee, to be irrevocable by the people of the State acting in a subsequently convened Legislature, unless power to revoke the grant of the franchise, or to alter or amend the law making the grant of it had been previously reserved, either in the law itself making the grant, or in a general law in force at the date of the passage of the law making the grant, not repealed, or not repealable, by the latter law.

This doctrine of the irrevocability of a franchise granted by the people of a State acting in their State Legislature has never been extended, and, no doubt, cannot be extended, by judicial decision, to a franchise granted by the people of the United States, assembled in Congress (Sinking Fund Cases, 99 U. S., 700, 747), but it has been extended to a franchise granted by any subordinate, local, municipal body, of even lowest degree, sitting under a State Legislature, if the State Legislature had, in apt and clear words, delegated to such body power to grant franchises by the irrevocable method of the Dartmouth College case (*Freeport Water Co. v. Freeport City*, 180 U. S., 587, 593). And the doctrine has been carried so high, or so low, that a franchise granted by a State, or by a municipal body sitting under a State, is so under the "protection" of the Constitution of the United States, ordained to "establish justice" and "promote domestic tranquility" (Constitu-

tion of the United States, Preamble), that it is irrevocable by the people of the whole State, even though obtained by fraud and corruption of their elected representatives, and even though the people, by their Legislature, should offer to turn over to the grantees of the franchise everything of value received by them in exchange for, or in consideration of, the grant, together with every dollar *bona fide* expended in using the franchise granted (*Fletcher v. Peck*, 6 Cranch, 87; *New Orleans v. Warner*, 175 U. S., 120, 145).

Such is "the supreme law of the land," and such it has been now for nearly a century, maintained, in a large measure, I think, by sheer force of the fact that the great name of John Marshall is subscribed to it. That it is not now, and has not been for several years back, in harmony with the general sense of right of a majority of the American people is fully attested by statutes and constitutional amendments,* in force in nearly every State in the Union, designed to get rid of it, in the way pointed out by Mr. Justice Story in his concurring opinion in the Dartmouth College case itself (4 Wheaton, 708)—that is to say, as above indicated, by reserving power to alter, amend or repeal laws making grants of special privileges or franchises (*Greenwood v. The Freight Company*, 105 U. S., 13).

V. THE LEGAL BASIS OF THE CHICAGO STREET RAILROAD TANGLE.

It is very evident to every one that the street railroad war in Chicago has been, and is being, waged upon the basis of the accepted legal opinion that this doctrine of the irrevocability of a franchise granted by the Legislature of a State in this Union always has applied, and applies to-day, in Illinois to street railroad franchises granted by the city council of Chicago. And it is largely, if not wholly, because of this accepted legal opinion that, on the one hand, the managers of the two largest street railroads in Chicago want so badly to get street railroad franchise from the city council, and that, on the other hand, perhaps a majority of the electors of Chicago appear to be even angrily determined that they must not get what they want so much.

Is that accepted legal opinion sound? Is it true, so far as street railroad franchises in Chicago are concerned, that the people of Chicago ever were subject to, or are not yet emancipated from, what Chief Justice Ryan of Wisconsin in 1874 called the "thralldom" of the doctrine of the Dartmouth College case (*Attorney General v. Railroad Companies*, 35 Wis., 425, 574)?

NOTE:

*They are gathered together in 3 Cook on Corporations, Ed. 4, 1898, Sections 946, *et seq.*

I think that, so far as street railroad franchises are concerned, the people of Chicago never were subject to, or bound by, the doctrine of the Dartmouth College case, and I also think the people of Chicago were emancipated from the possibility of being bound by the doctrine of that case in and by the present State Constitution, in force August 8, 1870, so far as all laws making grants of franchises, passed subsequent to that date, are concerned.

VI. THE DOCTRINE OF THE DARTMOUTH COLLEGE CASE.

Under the doctrine of the Dartmouth College case, certain provisions of a municipal ordinance making a grant of street railroad privileges, such as, for example, the part of the ordinance making the grant and the part of it fixing the rate of fare to be charged, *may become*, when the ordinance has been accepted by the grantee, irrevocable by act of the legislative authority of the municipality, or by act of the Legislature of the State, because such provisions *may become* "contracts," within the meaning of the word "contracts," in that clause of the Constitution of the United States which says that "No State shall pass any law impairing the obligation of contracts," and, consequently, any subsequent act of the legislative authority of the municipality, or of the State Legislature, altering, amending, or repealing, or revoking, such provisions, without the consent of the grantee, *might be* void, as a State law impairing the obligation of contracts, in contravention of the prohibition in the Constitution of the United States against the passage of any such State law.

But, as above indicated, it is settled that, in order that that constitutional prohibition, as interpreted and applied in the Dartmouth College case, may operate down upon any of the provisions of a municipal ordinance making a grant of street railroad privileges, it must appear, first, that the Legislature of the State, in apt, clear and unambiguous words, has delegated to the municipal legislative authority that passed the ordinance power to bind itself and the State Legislature by the irrevocable contract method of the Dartmouth College case not to use the legislative power to alter, amend or repeal, or revoke, because a municipal corporation of a State has only such powers of government as are expressly granted to it by the State Legislature, or by the State Constitution, and because the power to bind, by irrevocable contract, the people of a State not to use their legislative power is so very extraordinary a power that it cannot arise in a municipal body by mere inference (*Chicago v. Rumpff*, 45 Ill., 90; *People's Railroad v. Memphis Railroad*, 10 Wallace, 38, 51; *Birmingham St. R. Case*, 79 Ala., 465, 470; *Lake Roland El. R. Co. v. Baltimore*, 20 L. R. A., 126; *Providence Bank v. Billings*, 4 Peters, 514; *Charles River Bridge v.*

Warren Bridge, 11 Peters, 420). And it must appear, secondly, that the Legislature of the State was not forbidden by the State Constitution, in force at the date of the passage of the ordinance, to part with the power, or to divest itself of the right to use the power, to alter, amend, or repeal, or revoke, laws making grants of rights, privileges, franchises or immunities within the gift of the State, because such a State constitutional prohibition becomes part and parcel of the ordinance, and, therefore, a subsequent State law, altering, amending or repealing the ordinance is consistent with the contract evidenced by it, and cannot, therefore, impair its obligation (*Greenwood v. Freight Co.*, 105 U. S., 13; *New Jersey v. Yard*, 95 U. S., 104, 111; *Hamilton Gas Light and Coke Company v. Hamilton City*, 146 U. S., 258, 270).

VII. HAS THE DOCTRINE OF THE DARTMOUTH COLLEGE CASE EVER HAD ANY APPLICATION AT ALL TO ORDINANCES OF THE COUNCIL OF CHICAGO MAKING GRANTS OF STREET RAILROAD FRANCHISES?

The questions arising are: First, has the Legislature of Illinois ever made a direct, irrevocable grant of the right to lay down and use street railroad tracks in the streets of the city of Chicago? Second, has the Legislature of Illinois ever made an express grant of power to the council of Chicago to bind itself, and the State Legislature, by irrevocable contract, not to use, for a fixed period of time, the legislative power to alter, amend, repeal, or revoke an ordinance making a grant of the right to lay down and use street railroad tracks in the streets of Chicago? Third, could the Legislature of Illinois, consistently with the State Constitution, in force at the time, make an express grant of such power to the council of Chicago?

In considering these questions, the legislative history of Illinois must be divided into two periods—first, April 1, 1848, to August 8, 1870, during which Illinois was organized under the Constitution of 1848, and, second, August 8, 1870, to the present time, the present State Constitution having gone into force on August 8, 1870.

VIII. THE CONSTITUTION OF 1848 DID NOT FORBID THE STATE LEGISLATURE TO ITSELF MAKE, OR TO AUTHORIZE CHICAGO TO MAKE, IRREVOCABLE GRANTS.

As above stated, August 16, 1858, marks the beginning of street railroads in Chicago, because on that date the common council of Chicago made its first grant of a street railroad franchise. Illinois was then organized under her second State Constitution, in force April 1, 1848, and continued to operate under that Constitution, as above stated, until the present Constitution took effect on August 8, 1870. For present purposes, it may be conceded that, under the Constitution of 1848, the Legislature of Illinois could itself pass

a law making a direct, irrevocable grant of the right to lay down and use street railroad tracks in the streets of Chicago, or could delegate the power to make such irrevocable grant to the common council of Chicago. Under that concession, the sole inquiry here now is, whether the Legislature ever did pass a law prior to August 8, 1870, making such an irrevocable grant, or ever passed a law delegating to the council of Chicago power to make such an irrevocable grant.

IX. CHICAGO'S SPECIAL CHARTER OF 1851 NEITHER MADE, NOR DELEGATED POWER TO CHICAGO TO MAKE, IRREVOCABLE GRANTS.

At the date (August 16, 1858) of the making of the first grant of a street railroad franchise Chicago was operating as a municipal corporation under a special charter granted by the State Legislature, in force February 14, 1851 (Private Laws, Illinois, 1851, p. 40). This charter gave the common council a most extensive legislative power to regulate and control the use of the streets of Chicago, and specifically enumerated this legislative power: "To regulate and prohibit the use of locomotive engines within the city, and may require the cars to be used thereon, within the inhabited portions thereof, to be drawn or propelled by other power than that of steam; *to direct and control the location of railroad tracks* and depot grounds, and prohibit railroad companies from doing storage and warehouse business and collecting pay for storage" (Clause 49, Private Laws, 1851, p. 146). The charter of 1851 also gave the common council power "to license, regulate and suppress hackmen, draymen, carters, porters, omnibus drivers, cabmen, packers, carmen, and all others who may pursue like occupations with or without vehicles, under other cognomens, and prescribe their compensation" (Ch. 4, Sec. 4, Cl. 9, Act of 1851; 199 Ill., 517), as well as a sweeping power to make, amend and repeal all such ordinances "as may be necessary or expedient to carry into effect the powers vested in the common council * * * by this act" (Ch. 4, Sec. 4, Cl. 62, Act of 1851; 199 Ill., 517).

At the April term, 1859, the Supreme Court of the State decided that the common council of Chicago had power, under this charter of 1851, to pass an ordinance making a grant to a steam commercial railroad company of the right to lay down and use tracks in a public street, deriving the power of the council by implication from the power to regulate the use of streets and from the express power to regulate and control the location of railroad tracks within the city. Mr. Chief Justice Caton, to illustrate and explain the ruling of the Court, said that a contrary ruling would require the Court to hold that the common council did not have power, under the charter of 1851, to grant the right to lay down

and use street railroad tracks for the operation of street cars propelled by horses, a result which he thought would be a manifest absurdity (*Moses v. Pittsburg, Ft. Wayne and Chicago R. Co.*, 21 Ill., 511, 523).

Under the said ruling of the State Supreme Court in April, 1859, the common council clearly had the power, under Chicago's charter of 1851, to pass the said ordinance of August 16, 1858 (see, also, 199 Ill., 523).

That ordinance made a grant to certain individuals, Henry Fuller, Franklin Parmelee and Liberty Bigelow, of the right to lay down and use, with animal power only, street railroad tracks in certain streets in the south and west divisions of Chicago, for twenty-five years (199 Ill., 488). That ordinance was not *void*, because the common council had the power to pass it. And natural persons were then, and are now, just as competent to receive, exercise and enjoy a grant of the right to use a public street by operating a street railroad over and along it with horses and mules as a fictitious person, or corporation (*New Orleans, Spanish Fort and Lake Erie Railroad Co. v. Delamore*, 114 U. S., 501, 507-8).

But did that ordinance of August 16, 1858, when accepted by the grantees, become an unalterable, unamendable and irrevocable grant or contract? That it did not is clear, I think, because, plainly, the common council had no power, by delegation from the Legislature, in Chicago's charter of 1851, in clear, apt and unambiguous language, to give that *legal effect* to the ordinance, and because it had express power in the charter of 1851 to alter or repeal that ordinance.

In 1902, in reply to a contention made on behalf of the Chicago Union Traction Company, claiming that ordinance by assignment, that that ordinance of August 16, 1858, operated as an irrevocable contract, binding the council of Chicago not to cut the rate of street car fares below five cents by compelling that corporation to give transfer tickets, the Supreme Court of the State said: "At the time of the passage of the ordinance of August 16th, 1858, there was no law or statute in Illinois conferring upon the common council of any city the power to make a contract with any person, firm or corporation, engaged in the business of carrying passengers for hire, obligating the city never to change the rates once fixed, or to make a contract with any such person, firm or corporation in relation to a maximum rate of fare to be charged. Hence, the common council could not have passed Section 6 of the ordinance of 1858 in pursuance of any act of the Legislature, granting the power to make such contract. The only act of the

Legislature then existing, which conferred upon the common council the power to pass Section 6 of the ordinance of 1858, was the act of February 14th, 1851," that is Chicago's charter of 1851 (*Union Traction Company v. Chicago*, 199 Ill., 484, 523-4).

That ordinance of August 16, 1858, was, therefore, primarily a law. The State Supreme Court has said: "When an incorporated town or city has been invested with power to pass an ordinance, by the Legislature, for the government or welfare of the municipality, an ordinance enacted by the legislative branch of the corporation, in pursuance of the act creating the corporation, has the same force and effect of a law passed by the Legislature, and cannot be regarded otherwise than a law of, and within, the incorporation. An ordinance is a law of the inhabitants of the municipality" (*Mason v. City of Shawneetown*, 77 Ill., 533, 537; *Tudor v. Rapid Transit R. R. Co.*, 154 Ill., 129, 136).

That ordinance being primarily a law, and the common council being without power to turn it into an irrevocable and unalterable contract, necessarily each and every provision of it was alterable and repealable by the common council, within the limits of its delegated power of legislation, under its express power to alter and repeal in the charter of 1851, or by the State Legislature.

But it should be observed that that ordinance was also a *contract*, though not an *irrevocable contract*. An individual or a corporation never could be compelled, and never can be compelled, under our written Constitutions, against his or its will, to do the work of carrying people in street cars over and along a public street. The right and duty of an individual or corporation to perform that work can arise, and be imposed upon an individual or corporation, only with his or its consent. Hence an ordinance creating the right and imposing the duty necessarily must, in a large measure, take the form of a grant, or contract, to be accepted or assented to by the individual or corporation proposing to build and operate a street railroad under the ordinance. And such ordinance is, in substance, a *contract*, even when the municipality has no power, by delegation from the Legislature, or because of a reservation of power, to make the ordinance unalterable and irrevocable, but it is an *alterable and revocable contract*, that is to say, alterable and revocable by one of the parties to it, the people, by their agents, the legislative authority of the municipality acting within the limits of its delegated power of legislation, or the Legislature of the State. Until the right to alter and revoke is exercised, the contract, though revocable, is just as binding and obligatory upon the parties to it, and upon the whole world, as it would be

if made irrevocable. Such alterable and revocable contracts are not unusual in private transactions. For example, a lease of a house for a fixed term of years, terminable before the expiration of the term at the will of the landlord, is a contract binding upon tenant, landlord, and all the world, until the landlord elects to put an end to it and to enter into the possession, use and enjoyment of his own. Obviously, had the Supreme Court of the United States reached a different result in the Dartmouth College case, and it probably would have done so had the cause been argued differently at the bar (8 Am. Law Rev., 210, 211, and Note 2; 28*ib.*, 336, 440), no State law and no municipal ordinance making a grant of the right to use a street for street railroad purposes *could* operate as an irrevocable contract, and the grantees would have to rely, as they have always done, and must now do, all over the world, "for the perpetuity and integrity of the franchises granted to them, solely upon the faith of the sovereign grantor" (Cooley, Const. Lim., Ed. 6, 472).

This difference between revocable contracts or grants, and irrevocable contracts or grants, respecting the use of streets for street railroad purposes, under the doctrine of the Dartmouth College case, must ever be kept in mind to avoid falling into the fallacy, not unusual in such cases, of *non sequitur*, by drawing the conclusion, "the ordinance is *irrevocable*" from the premise, "the ordinance is a *contract*."

That ordinance of August 16, 1858, was, therefore, in one aspect *a law* and in another *a contract*, but, by reason of the lack of power in the common council to make the ordinance unalterable, unamendable and irrepealable, and by reason of its express power to alter, amend and repeal, and under the rule in the Dartmouth College case, it was a law or a contract which the common council or the State Legislature could alter or determine (*Attorney General v. R. R. Companies*, 35 Wis., 424, 574; *Monongahela Navigation Co. v. United States*, 148 U. S., 312, 343; *Slaughter House Co. v. Slaughter House Co.*, 111 U. S., 746; *The Slaughter House Cases*, 16 Wallace, 36; Cooley, Const. Lim., Ed. 6, 472).

X. CHICAGO'S SPECIAL CHARTER OF 1863 NEITHER MADE, NOR DELEGATED POWER TO CHICAGO TO MAKE, IRREVOCABLE GRANTS.

Chicago's special charter of 1851 was superseded by a special charter, in force February 13, 1863 (Private Laws, Illinois, 1863, Vol. 1, p. 40), very considerably amended by an act, in force March 9, 1867 (Private Laws, Illinois, Vol. 1, p. 754). Express power to regulate and control the use of streets and to amend and repeal ordinances is given in the charter of 1863 in much the

same words as in the charter of 1851. Clause 64, p. 60, of the charter of 1863 grants power "to regulate the running of horse railway cars, the laying down of tracks for the same, the transportation of passengers therein, and the kind of rail to be used." In the act of 1867, clause 9, page 771, gives power "to authorize the use of streets and alleys in said city by railroad companies or city railroad companies, for the purpose of laying tracks and running cars thereon;" provides that such "permission and authority" shall not be given, nor shall any such "grant or permission" already given be extended, unless upon a vote of three-fourths of all the aldermen elected, and provides that "no grant, consent, contract or permission heretofore given or made, or hereafter to be made or given, shall in any case be extended until within one year of the expiration of such grant, consent, contract or permission." Clause 23, page 773, gives power "to allow dummies or steam engines to be used on the street railways of the city by ordinance or contract;" also, "at any time to order a partial or total discontinuance of the use of such dummies and engines in said city." An act, in force March 10, 1869 (Private Laws, Illinois, 1869, Sec. 1, p. 335), amended said clause 9 so as to read: "To allow dummies or steam engines to be used on the street railways of said city upon such terms and conditions as said common council may by contract with said railway companies determine."

Wholly aside from the express grant of power to amend and repeal all ordinances, it is impossible to affirm, upon the settled rules of interpretation for such cases, that any of the aforesaid words are apt and proper, either to make, or to delegate power to the common council of Chicago to make, irrevocable grants or contracts respecting the operation and management of street railways in public streets. The multiplicity of words used to designate the effect of an ordinance granting the right to lay down and use street railroad tracks in a street—grant, consent, contract or permission and authority, ordinance or contract—indicate clearly that there was no legislative intent to grant power to make irrevocable contracts. The word franchise is avoided.

The uncertainty of conception evidenced by these various words used as equivalents, and the avoidance of the word franchise, is explained, I think, by two decisions of the Court of Appeals of New York, one in December, 1856 (*Davis v. The Mayor of New York*, 14 N. Y., 506), and the other in September, 1863 (*Milham v. Sharp*, 27 N. Y., 611), wherein it was ruled, that a New York municipal ordinance passed December 29, 1852 (quite like the first Chicago street railroad ordinance of 1858), in the now usual

form, granting to Jacob Sharp and his associates the right to lay down and use street railroad tracks in Broadway, New York city, was utterly void under New York's charter, as an irrevocable grant of a franchise; one Judge, Wright, holding the ordinance good as "a license, revocable at pleasure, although in form a grant or contract;" and another Judge, Comstock, holding that the board of aldermen of New York city had power, under the city charter, to authorize "by mere license" individuals to construct and operate a street railroad in Broadway, but holding the ordinance void, because, on its true construction, it was an attempt to make an irrevocable grant of a franchise in perpetuity. As above stated, the Supreme Court of Illinois ruled, in 1859, that the council of Chicago had power, under the charter of 1851, to authorize the use of streets for railroad purposes.

Chicago continued to operate under the charter of 1863, as amended in 1867, until, pursuant to a popular vote cast April 23, 1875, she organized as a city on the first Monday in May, 1875, under the general Cities and Villages Act, in force July 1, 1872. The Constitution of 1870, in force August 8 of that year, by Section one of the Schedule, continued said charter of 1863 and its amendments in force, so far as not inconsistent with the provisions of that Constitution.

XI. THE SPECIAL ACTS OF THE LEGISLATURE OF 1859, 1861 AND 1865, RELATING TO HORSE RAILROADS IN CHICAGO, NEITHER MADE, NOR AUTHORIZED CHICAGO TO MAKE, IRREVOCABLE GRANTS.

It has never been contended by anyone, so far as I know, that by said charters of 1851 and 1863 the Legislature either made, or gave the common council of Chicago power to make, irrevocable grants to, or irrevocable contracts with, anyone respecting the operation and management of street railroads in the streets of Chicago. The *assumption* has been, that the common council of Chicago had *no power at all*, under those charters, to deal with the subject of laying down and using street railroad tracks in the streets of Chicago (Opinion of Corporation Counsel, July 17, 1883, Council Proceedings, 1883-4, p. 77; *Govin v. Chicago*, 132 Fed. Rep., 848), an assumption that is manifestly irreconcilable with the aforesaid ruling of the State Supreme Court in 1859. Those who maintain that the Legislature either made, or authorized the common council of Chicago to make, prior to August 8, 1870, irrevocable grants or contracts respecting the operation and management of street railroads in the streets of Chicago, point only to certain special acts passed by the Legislature in 1859, 1861 and 1865, the primary purpose of which

was to empower certain individuals to carry on the street railroad business in Chicago as corporations.

February 19, 1859, the Legislature passed a special act creating the individual grantees named in the said ordinance of August 16, 1858, a body politic and corporate by the name of the Chicago City Railway Company for twenty-five years. Section 2 provided as follows:

"The said corporation is hereby authorized and empowered to construct, maintain and operate a single or double track railway, with all necessary and convenient tracks for turnouts, sidetracks and appendages, in the city of Chicago and in, on, over and along *such* street, or streets, highway, or highways, bridge or bridges, river or rivers, within the present or future limits of the south or west divisions of the City of Chicago, *as* the Common Council of said City *have authorized* said corporators, or any of them, or *shall authorize* said corporation so to do, in such manner and upon such terms and conditions, with such rights and privileges *as* the said Common Council *has or may* by contract with said parties, or any or either of them, *prescribe*; but said corporation shall not be liable for the loss of any baggage carried on said railways, kept in and under the care of its owner, his servant or agent."

The tenth section of the act created certain named individuals a body politic and corporate by the name of the North Chicago City Railway Company, with the same powers and privileges in the north division of Chicago as were given to the Chicago City Railway Company in the south and west divisions. The act was entitled "An act to promote the construction of *horse* railways in the City of Chicago" (Private Laws, Illinois, 1859, p. 530).

February 21, 1861, "an act to authorize the extension of *horse* railways in the City of Chicago" was passed, creating certain individuals a body politic and corporate under the name of the Chicago West Division Railway Company, with substantially all the powers for constructing and operating street railroads in the west division of Chicago that were conferred by the Act of 1869 upon the two corporations thereby created (Private Laws, Illinois, 1861, p. 340).

July 29, 1863, the Chicago City Railway Company agreed to sell to the Chicago West Division Railway Company all its property, privileges and franchises in the west division of Chicago, and the agreement was executed by a deed of conveyance on July 20, 1863 (199 Ill., 498-499).

February 6, 1865, "an act concerning *horse* railways in the City of Chicago" was passed (Private Laws, Illinois, 1865, p. 597). It extended the corporate life of said three horse railway corpor-

ations from twenty-five years to ninety-nine years, and amended section two of the Act of 1859 by making some slight verbal changes in it and by adding to it the following words:

"And any and all *acts or deeds of transfer* of rights, privileges or franchises, between the corporations in said several acts named, or any two of them, and all *contracts, stipulations, licenses and undertakings*, made, entered into or given, and as made or amended by and between the said common council and any one or more of the said corporations, respecting the location, use, or exclusion of railways in or upon the streets, or any of them, of said city, shall be deemed and held and continued in force, during the life hereof, as *valid and effectual*, to all intents and purposes, as if made a part, and the same are hereby made a part, of said several acts" (of 1859 and 1861).

The Chicago City Railway Company, created by said act of 1859, operated horse railways in the south division of Chicago up to some time after the year 1880, when horses began to give way to the cable and electricity as a motive power, that company, and all other street railway companies in Chicago, obtaining the right to change their motive power under ordinances passed by the city council of Chicago after 1880, or, at least, after the taking effect of the present State Constitution on August 8, 1870. The North Chicago City Railway Company, created by the act of 1859, operated horse railways in the north division of Chicago up to about the year 1886, when it made a lease of all its property and franchises to the North Chicago Street Railroad Company, a corporation organized under the Illinois General Incorporation Act, in force July 1, 1872. This latter company operated horse, cable and electric railways in the north division of Chicago up to about June 1, 1899, when it made a lease to the Chicago Union Traction Company, organized under the Illinois General Incorporation Act, in force July 1, 1872. The Chicago West Division Railway Company, created by the act of 1861, operated horse railways in the west division of Chicago up to about the year 1889, when it made a lease to the West Chicago Street Railroad Company, organized under the Illinois General Incorporation Act, in force July 1, 1872. This latter company operated horse, cable and electric railways in the west division of Chicago up to June 1, 1899, when it made a lease to the said Chicago Union Traction Company. The latter company claims, without any reason (199 Ill., 500-503), the right to use and enjoy whatever rights the North Chicago City Railway Company and the Chicago West Division Railway Company got under the said acts of 1859, 1861 and 1865, just as fully as the Chicago City Railway Company, which was one of the original corporations named in said acts.

XII. THE WORDS ABOVE QUOTED FROM THE ACT OF 1865, IN CONJUNCTION WITH THE WORDS ABOVE QUOTED FROM THE ACT OF 1859, DID NOT OPERATE TO TURN ALTERABLE AND REVOCABLE ORDINANCES PASSED BY THE COMMON COUNCIL INTO IRREVOCABLE CONTRACTS FOR TWENTY-FIVE OR NINETY-NINE YEARS.

The words quoted from the act of 1865 are wholly retrospective. They touch and affect only past transactions, and have no prospective operation whatever; that is to say, they do not affect any transactions that took place after February 6, 1865, the date of the passage of the act in which they are found. One of the main purposes of the men interested in those acts evidently was to confine each of the corporations created by the acts of 1859 and 1861 to a particular division or side of the city of Chicago, and to prohibit one corporation from invading the territory, side or preserve of the other. They attempted, prior to February 6, 1865, to do that by agreements and deeds among themselves, running for a much longer period than twenty-five years, the allotted span of life given the corporations by the acts of 1859 and 1861 (199 Ill., 498, 530). Under the acts of 1859 and 1861 those agreements and deeds were of extremely questionable *validity*, and the common council of Chicago, however much it may have tried by "*contracts, stipulations, licenses and undertakings*," had no power to inject validity into such "acts or deeds of transfer of rights, privileges or franchises between the corporations * * * or any two of them, respecting the location, use or exclusion of street railways in or upon the streets or any of them of said city" (*Chicago Gas Light and Coke Company v. People's Gas Light & Coke Co.*, 121 Ill., 530). The Legislature alone had the power to do that, and attempted to do it on February 6, 1865, by laying down a rule for the guidance of the courts in effect saying: You must hold all those acts, deeds of transfer, contracts, stipulations, licenses and undertakings, parceling out Chicago between these three horse railway corporations "valid and effectual," "during the life hereof," "*as made or amended*" by the parties to them, just as if the State Legislature, sitting in 1859 and 1861, had written out the whole of them in words in the acts of 1859 and 1861 and had then passed those acts. Assuming that the Legislature, sitting in 1865, could, consistently with the mandate of the Constitution of 1848 that "every bill shall be read on three different days, in each house" (Article III, Section 23), thus in 1865 stuff tons of unknown and unknowable literature into the bosoms of acts passed by a former Legislature in 1859 and 1861, the words above quoted do not, so far as I can see, necessarily alter *the legal effect* of ordi-

nances passed prior to February 6, 1865. That is to say, if an ordinance granting the right to lay down and use tracks in a street, passed prior to February 6, 1865, operated as an alterable, amendable and revocable contract, the said words of the act of 1865 did not operate retrospectively upon such previously passed ordinance to turn it into an unalterable, unamendable and irrepealable, or irrevocable, contract for ninety-nine years, because the act of 1865, if it says anything at all about such ordinances, says they shall be held "*valid and effectual as made or amended,*" and if you carry them back "as made or amended" to 1859 and 1861 and then insert them "as made or amended" into those acts of 1859 and 1861, necessarily you must carry into those acts the reserved legislative power to alter and revoke, otherwise you do not carry them back and insert them "as made or amended" into those acts, but you carry back and insert into those acts something widely and totally different from the thing previously made. The intent of the framers of the act of 1865, as evidenced by the retrospective words used in the act, was, I think, that those retrospective words should apply to, and operate upon, only such past "acts," "deeds of transfer," "contracts, stipulations, licenses, and undertakings," as were of questionable *validity*, or wholly *invalid*, under the powers granted in the acts of 1859 and 1861, and in Chicago's charters of 1851 and 1863. An intent to change the legal effect of a *valid* ordinance previously passed from a *revocable* contract into an *irrevocable* contract certainly is not clearly made manifest. As above stated, an ordinance making a grant of the right to lay down and use street railroad tracks in a street may very well be "valid and effectual," though in legal effect an alterable and revocable contract.

A question left is whether the words first above quoted from the act of 1859, in so far as retrospective in their operation, and carried forward into the acts of 1861 and 1865, operated to change previously passed ordinances making grants of the right to lay down and use street railway tracks in public streets, which, if passed solely under the powers granted in Chicago's charters of 1851 and 1863, could operate only as revocable contracts, into irrevocable contracts.

The acts of 1859 and 1861 gave certain named individuals the right to be a corporation. They then stated the purposes for which the corporation was formed, by giving the corporation certain specified powers, or, in other words, by assigning to it a very limited sphere of human activity and endeavor, to wit: "to construct, maintain and operate a single or double track railway in the city of Chicago." Then, recognizing that the railway would have

to be constructed and operated in, on, over and along streets, highways, bridges and rivers, of which the common council, under the city's charter, had exclusive control, and that the operation and management of street railways in Chicago was a purely local affair, it *restricted* the corporation to the use of only "*such*" streets, highways, bridges and rivers "*as the common council of said city have authorized* said corporators * * * *or shall authorize* said corporation so to do." But the common council was not restricted to a mere grant or refusal of authority,—to saying merely yes or no,—to use the streets, highways, bridges and rivers of the city, but the corporation was required to construct and operate its railway in streets authorized to be used by the common council "in such manner and upon such terms and conditions, with such rights and privileges, as the said common council has or may by contract * * * prescribe."

In 1902, the Supreme Court of Illinois said that the words, "as the said common council has or may by contract prescribe," are elliptical, and mean, "as the said common council *has prescribed*, or *may by contract prescribe*," and that, therefore, in so far as the words are retrospective, they did not change the *legal effect* of a *valid* ordinance passed prior to the date of the act of 1859 from a *revocable* contract into an *irrevocable* contract, whatever might be their effect upon ordinances passed subsequent to the date of the act, February 19, 1859 (199 Ill., 484, 524). The Court said: "The last clause is elliptical and the word 'prescribed,' to which the word 'has' applies, was accidentally omitted. If the word thus omitted be supplied, the clause should read as follows: 'With such rights and privileges as the common council has prescribed, or may by contract with said parties, or any or either of them, prescribe.' The words, 'by contract with said parties, or any or either of them,' qualify the words 'may prescribe.' That is to say, the right to contract was a right to be exercised in the future. The words 'with such rights and privileges as the said common council has prescribed' refer to the past." That view is certainly permissible (*Freeport Water Co. v. Freeport City*, 180 U. S., 587, 598). If it "be not clear, as I think it is, yet any other construction is certainly not so, and doubt is fatal to the claim" of a legislative intention to turn a past municipal revocable contract or grant into an irrevocable contract or grant (*Mobile, etc., R. Co. v. Tennessee*, 153 U. S., 486, dissenting opinion).

XIII. THE SAID SECTION 2 OF THE ACT OF 1859, IN SO FAR AS IT IS PROSPECTIVE IN ITS OPERATION, DID NOT MAKE A DIRECT IRREVOCABLE GRANT OF THE RIGHT TO USE THE STREETS OF CHICAGO FOR STREET RAILROAD PURPOSES.

The words, in so far as prospective, are: "The said corporation is hereby * * * empowered to construct, maintain and operate a single or double track railway * * * in the city of Chicago, and in, on, over and along *such* * * * streets * * * of the city of Chicago as the common council of said city * * * *shall authorize* said corporation so to do, in such manner, and upon such terms and conditions, and with *such* rights and privileges as the said common council *may by contract* * * * (with said corporation) *prescribe.*"

Manifestly, the words of the act do not authorize and empower the corporation *to enter upon* any street in Chicago and locate and construct its railway *there*. The only granted power is the abstracted corporate power, or capacity, to build and operate a street railroad in Chicago. The act virtually prohibits the corporation to use that power in or upon any street in Chicago, for the corporation is allowed to use the power only in "*such streets*" "*as the common council shall authorize.*" Plainly, the words of the section do not make a direct grant of the franchise *to enter upon* a street in Chicago and build and operate a street railroad *there*. The council, under the act, clearly could refuse to authorize the use of a street by the corporation. Could the corporation lawfully, in the face of such refusal, enter upon a street? Plainly not.

XIV. SAID SECTION 2, IN SO FAR AS IT IS PROSPECTIVE IN ITS OPERATION, DID NOT DELEGATE POWER TO THE COMMON COUNCIL OF CHICAGO TO MAKE IRREVOCABLE GRANTS OF THE RIGHT TO LAY DOWN AND USE STREET RAILROAD TRACKS IN THE STREETS OF CHICAGO.

The only words manifesting such legislative intent are the words "by contract." Acts of a Legislature must be construed according to the rules of English grammar. The words "by contract" form an adverbial phrase. Looking at the sentence in which they are found, obviously they must qualify the preceding verb "shall authorize," or the verb whose parts they split, that is, "may * * * prescribe." "The strict rule of grammar would seem to require, as a general thing, a limiting clause or phrase, following several expressions to which it might be applicable, to be restrained to the last antecedent" (Endlich, Interpretation of Statutes, Sec. 414). Applying that rule of grammar, the words "by contract" must qualify only the antecedent "may prescribe." The application of this rule of grammar is expressly enjoined by the fact that the words "by contract" are placed between "may" and "prescribe." That position of the words appears to demonstrate that the intent of the Legislature was to restrict the qualifying phrase, "by contract," to the verb "may prescribe." It is true

that "this technical grammatical rule is liable to be displaced whenever the subject matter requires a different construction" (Endlich, *supra*). But there is nothing about the subject matter of this act rendering it necessary to displace this grammatical rule. The question being whether the act authorizes the making of contracts irrevocably binding a State not to use its legislative power, the law requires that the words used be so construed as to preserve the legislative power of the State intact as a continuing, unsold power, unless an intention to sell it out by contract is shown in clear, grammatically constructed sentences (*Providence Bank v. Billings*, 4 Peters, 514; *Charles River Bridge v. Warren Bridge*, 11 Peters, 420). Besides, as above stated, the Legislature itself restricted the qualifying words "by contract" to the verb "may prescribe" by placing them between "may" and "prescribe." Besides, the Supreme Court of Illinois has said, as above shown, that the words "by contract" cannot be carried back and made to qualify the elliptical verb "has prescribed" (*Union Traction Co. v. Chicago*, 199 Ill., 484, 524). And the Circuit Court of the United States has said that the words "by contract" cannot be carried back and made to qualify the verb "shall authorize" (*Govin v. Chicago*, 132 Fed. Rep., 848, 856).

The words, "in such streets as the common council shall authorize," are not, in form at least, a grant of power to the council. In form they are a restriction or limitation upon the use of power granted to the street railroad corporation created by the act to construct a street railroad, forbidding that corporation to use that power on a particular part of the earth's surface,—the streets of Chicago,—except when authorized "so to do" by the common council of Chicago. The words recognize the council as the existing legislative authority of the local government of Chicago, organized by and under Chicago's municipal charter. The words, therefore, refer us to that charter to ascertain in what manner the council may act when it sets out to authorize the street railroad corporation to enter upon a street in Chicago and construct a street railroad in, on, over and along that street. That charter shows that the council must act "by ordinance;" that the council cannot make the ordinance irrevocable for a fixed term of years; that the council has express power to alter, amend and repeal the ordinance.

It is plain, therefore, that the words of this section 2 of the acts of 1859, 1861 and 1865, did not clothe the common council of Chicago with power to give the street railroad corporations, organized under those acts, an irrevocable right, or franchise, to lay

down and use street railroad tracks in the streets of Chicago for a fixed term of years.

Taking up now the words,—“in such manner, and upon such terms and conditions, and with such rights and privileges as the said common council * * * may * * * by contract prescribe,”—evidently they also subject the street railroad corporation to a further restriction or limitation upon the use of its power to construct, maintain and operate a street railroad in the streets of Chicago by compelling the corporation to use the power agreeably to such rules and regulations touching the mode of construction, operation and management of its street railroad in the streets of Chicago as the common council “may by contract prescribe.” Is it permissible to insert the word “irrevocable” before the word “contract”? Manifestly it is not permissible, without violating settled rules of statutory interpretation for such a case. The word “contract” is sufficiently comprehensive to include revocable and irrevocable contracts. But the word here occurs in a clause at once limiting the power of a street railroad corporation, and enlarging the power of the legislative authority of a municipal corporation. To insert the word “irrevocable” before the word “contract” would give the clause a capacity, or potentiality, to operate as an enlargement of the power of the street railroad corporation, and as a limitation upon the power of the municipal corporation, by enabling the legislative authority of the municipal corporation to divest itself, and the State Legislature as well, of a portion of the legislative power of the State in favor of the street railroad corporation. Besides, if, as above shown, the essence and quintessence of an ordinance making a grant of the right to use a street,—the granting part of it,—cannot, under the act, operate as an irrevocable contract, what sense would there be in making the parts of such an ordinance touching the construction, operation and management of the road operate as irrevocable contracts? Ninety-nine per cent. of all legislative regulations of the operation and management of a street railroad in the streets of a city, affecting as they do the health and safety of the people, cannot, by any possibility, be brought within the application of the doctrine of the Dartmouth College case (cases cited *infra*).

The words of the clause here in hand “purport to enlarge, not to diminish the powers vested” in the common council by Chicago’s existing charter (*McCulloch v. Maryland*, 4 Wheaton, 311, 420): “It is a rule of construction, acknowledged by all, that the exceptions from a power (granted or delegated) mark its extent; for it would be absurd, as well as useless, to except from a granted power that which was not granted,—that which the words of the

grant could not comprehend" (*Gibbons v. Ogden*, 9 Wheaton, 1, 191). Now the part of section 2 of the act of 1859 in question here being, in substance, a present grant of more power to the common council, note the subject or object of legislative power excepted from the grant: "but said corporation shall not be liable for the loss of any baggage carried on said railway kept in and under the care of its owner, his servant or agent." The subject or object evidently is a subject or object of what is commonly called the police powers of a State government. A State Legislature never could, as hereinafter shown, by irrevocable contract, under the doctrine of the Dartmouth College case, bind itself not to use its police powers over some subjects or objects of government. The exception, therefore, would appear to be irreconcilable with an expressed intent, by use of the phrase "by contract," to clothe the common council of Chicago with the extraordinary power to bind itself, and the State Legislature as well, by irrevocable contract, not to use for ninety-nine years the legislative power of the State to its fullest extent over the operation and management of street railroads in Chicago by the corporations created by the acts of 1859 and 1861.

Viewing the grant of power to the street railway corporations, in the act of 1859, "to construct, maintain and operate a single or double track railway * * * in the city of Chicago, *and* in, on, over and along such * * * streets * * * as the common council of said city * * * shall authorize said corporation so to do, in *such* manner and upon such terms and conditions, and with such rights and privileges as the said common council * * * may, by contract, * * * prescribe," as a present grant of more power to the common council of Chicago, the grant evidently did enlarge the pre-existing powers of the council by enabling it to prescribe regulations, in the form of terms and conditions in the ordinance authorizing the use of streets and to grant rights and privileges in such ordinance, that it could not have prescribed or granted under the powers then vested in the common council by Chicago's charter. For example, it could and did (revocably) exempt the street railway corporations from liability to pay a special assessment for curbing and paving streets (*Chicago v. Sheldon*, 9 Wallace, 50), a thing the council could not possibly have done under any power vested in the council by Chicago's charter, as it stood in 1859 (*Chicago v. Baer*, 41 Ill., 306). And it is familiar law in Illinois, that a city council can impose regulations upon a street railroad company, a gas company or a telephone company in the form of terms and conditions in an ordinance making a grant of the right to use streets, that it cannot

impose by a general ordinance passed pursuant to its other grants of powers from the Legislature, and that an acceptance of the ordinance estops the grantee to deny the reasonableness of its terms. For example, a city council can, in such an ordinance, prescribe a rate to be charged for telephones, though it is highly probable a city council has no power to regulate telephone rates by a general ordinance (Cities and Villages Act of 1872, Part 1, Article V., Section 1, Clause 13; Horse and Dummy Act of 1874, Section 3, R. S., 1874, 571; Sessions Law, 1897, 282; Sessions Laws, 1899, 337; *Decatur Gas Light & Coke Co. v. Decatur*, 120 Ill., 67., *Suburban R. Co. v. People*, 178 Ill., 594; *People's Gas Light & Coke Co. v. Hale*, 94 Ill. App., 406; *Chicago Telephone Co. v. Illinois Manufacturers' Association*, 106 Ill. App., 54).

This construction gives complete force and effect to the words "by contract" without attributing to the State Legislature an intent to tie its own hands, and the hands of the common council of Chicago, acting under powers delegated and to be delegated, for ninety-nine years, respecting the regulation and control of the operation and management of street railroads in Chicago.

It is difficult indeed to make out that the State Legislature intended to, and did, in and by the acts of 1859, 1861 and 1865, divest itself of power to add to, and take from, the delegated powers of the common council of Chicago over the operation and management of street railroads. If the man who drew those acts and the Legislatures that passed them intended to deprive the common council of the power that it had under Chicago's charters of 1851 and 1863 to make revocable contracts, and to give the council a new power, and to restrict the council to a use of that new power, that is to say, to make irrevocable contracts respecting the laying down and use of street railroad tracks in the streets of Chicago, why did they not say it in plain language? In 1902, the Supreme Court of Illinois, in reply to the argument that two ordinances passed May 23, 1859, giving the Chicago City Railway Company and the North Chicago City Railway Company, incorporated by the special act of 1850, a right to use certain streets, created irrevocable contracts, binding the council not to change the five cent rate of fare specified in them, said: "Again, in the ordinance of May 23, 1859, the language shows that the common council, which passed that ordinance, relied upon its power to do so under said clause 9 of the charter of 1851. Section 1 of the ordinance of May 23, 1859, recites that, under and by virtue of the act of the Legislature approved February 14, 1859, 'and by virtue of the powers and authority in the said common council otherwise by law vested,' the council thereby granted permission to

the Chicago City Railway to lay a single or double track for a railway, etc. In other words, the ordinance of May 23, 1859, was not only passed in pursuance of the act of February 14, 1859, but also by virtue of the power and authority vested by law in the common council otherwise than by the act of February 14, 1859. Necessarily, the power, referred to in Section 1 of the ordinance as otherwise by law vested in the council, was the power so vested by virtue of clause 9, section 4 of chapter 4 of the charter of 1851. * * * The fixing of a maximum rate of five cents for each fare for any distance can as well be attributed to an exercise of the power to prescribe the compensation under the charter of 1851, as to any power to make a contract upon the subject, embodied in the act of February 14, 1859" (*Union Traction Co. v. Chicago*, 199 Ill., 484, 525-6). In other words, the Court said, conceding, for the sake of argument, but not deciding, that the act of 1859 gave the common council power to make an irrevocable contract, the act did not take away its power, under the city's charter, to make a revocable contract; a given ordinance expressly passed in exercise of *both* powers cannot be at once a revocable contract and an irrevocable contract; under the rule for such cases the Court had to say that the ordinance must operate in the way most favorable to the people, that is, as a revocable contract (*Providence Bank v. Billings*, 4 Peters, 514; *Charles River Bridge v. Warren Bridge*, 11 Peters, 420).

If the man who drew the acts of 1859, 1861 and 1865, and the Legislature that passed them, did really want to give the common council power to make irrevocable contracts with the corporations created by them, why did they leave untouched the power of the common council, under the city's charter of 1851 and 1863, to amend and repeal all ordinances? Why did they not take these corporations and the construction and operation of street railroads by them in the streets of Chicago out from under the scope and application of that power to amend and repeal? It is impossible to get rid of that express power to amend and repeal by mere inference.

Again, if the man who drew those acts, and the Legislature that passed them, really wanted to give the common council of Chicago power to make irrevocable contracts with the corporations created by those acts, why was no limitation placed upon the sweeping power to prescribe "terms and conditions," except the dubious limitation, "by contract," when the Legislature, at or about the same time, constantly used the word "contract" in the same connection as an alternative for "ordinance" (Charter of 1863, *supra*)? In 1867, when the State Legislature intended the

word "contract," in connection with the subject of the municipal control of street railroads, to mean irrevocable contract, it used the word "irrevocable" (Clause of Charter of 1867, *supra*, respecting use of dummies on street railroads).

And why were those corporations so carefully limited to the use of horses as a motive power on the street railways they were empowered to construct and operate (*North Chicago City Railway v. Lake View*, 105 Ill., 207, 213; Constitution, 1848, Art. 111, Sec. 23)? The men of 1859 and 1865 were perfectly aware that horses would not continue to be used on street railways in Chicago for ninety-nine years. This is evidenced by the grants of power in the acts of 1867 and 1869 to the common council to authorize the use of dummies and steam engines. In April, 1859, Mr. Chief Justice Caton said: "Cars upon street railroads are now generally, if not universally, propelled by horses, but who can say how long it will be before it will be found safe and profitable to propel them with steam, or some other power besides horses" (21 Ill., 523)? The doctrine of the Dartmouth College case has never been extended so far as to empower a State Legislature, or a municipal corporation, sitting under a State Legislature, to grant an irrevocable right to drive, for ninety-nine years, mules and horses between two iron rails laid down in a street in a growing city such as Chicago was in 1859 and 1865. It is established by the Federal Supreme Court that a State Legislature cannot grant an irrevocable right to make and sell beer (*Beer Co. v. Massachusetts*, 97 U. S., 25), to maintain a lottery and sell lottery tickets (*Stone v. Mississippi*, 101 U. S., 814), to manufacture and sell manure in a city (*Fertilizing Co. v. Hyde Park*, 97 U. S., 659), to maintain and operate a slaughter house in a city (*Slaughter House Co. v. Slaughter House Co.*, 111 U. S., 746), or to operate a railroad in a city over tracks laid even with the grade of a street (*N. Y. & N. E. R. Co. v. Bristol*, 151 U. S., 556). The principle of these cases, that the doctrine of the Dartmouth College case does not extend so far as to authorize a State Legislature, or a municipal corporation, to bind itself, by irrevocable contract, not to use its legislative power to protect the lives, health and morals of the people of the State, would appear to apply to the propelling of cars over the streets of Chicago with horses and mules for ninety-nine years (*McCartney v. Chicago & Evans-ton R. Co.*, 112 Ill., 611).

The truth is, I think, that the man who drew those acts of 1859, 1861 and 1865, and the Legislature that passed them, had no intention whatever to give the common council power to make irrevocable contracts with the corporations created by those acts.

If they thought about the matter at all, I think they had a doubt in their minds whether the State Legislature *could* constitutionally delegate such power to the council. The sole purpose of using the words "by contract," was, I think, to prevent the possibility of a court decision, such as was made by the Court of Appeals of New York in 1856, and again in 1863, and by a lower court in Cook County in 1858 or 1859 prior to the decision of the Supreme Court of Illinois in 1859, above cited, holding the ordinances passed, and to be passed, *void* because expressed in the form of contracts (*Davis v. Mayor*, 14 N. Y., 506; *Milham v. Sharp*, 27 N. Y., 611; Council Proceedings, 1883-4, 77).

XV. THE EFFECT OF CHICAGO'S CHARTER OF 1863, AS AMENDED IN 1861, ON THE POWERS VESTED IN CHICAGO'S COUNCIL BY THE ACTS OF 1859, 1861, 1865.

But if it be conceded that the said special acts of 1859 and 1861 did clothe the common council with power to make irrevocable grants to, or irrevocable contracts with, the street railway corporations created by them, for twenty-five years, a question arises whether the common council was not stripped of the right to use that power by the taking effect of the city's charter on February 13, 1863. And if the taking effect of that charter did strip the council of the right to use that power, and the council was re-invested by the act of February 19, 1865, with power to make irrevocable grants to, or irrevocable contracts with, the street railway corporations, to which the act applied, for ninety-nine years, a question arises whether the common council was not stripped of the right to use that power by the taking effect on March 9, 1867, of the act amendatory of the city's charter of 1863?

As has already been shown, under the city's charter of 1863, and under the amendatory act of 1867, the common council was clothed with power to deal with the operation and management of street railroads in Chicago by the legislative method of passing ordinances making only alterable and revocable contracts or grants. In 1904 the Circuit Court of the United States for the Northern District of Illinois ruled that whatever power the common council got out of the said special acts of 1859, 1861 and 1865 was extinguished utterly when Chicago organized on the first Monday in May, 1875, as a city under the Illinois general Cities and Villages Act, in force July 1, 1872, because that act of 1872, "delegated to the city plenary power to grant or withhold franchises." But the city's charter of 1863, and the amendatory act of 1867, also "delegated to the city plenary power to grant or withhold franchises," and, therefore, on the *ratio decidendi* of the ruling referred to, the taking effect of the charter of 1863 on February

13 of that year stripped the common council of the right to look to the special acts of 1859 and 1861 as a source of power, and the taking effect of the amendatory act of 1867 on March 9 of that year stripped the common council of the right to look to the act of 1865 as a source of power (*Govin v. Chicago*, 132 Fed. Rep., 548).

It is simply impossible, as the ruling referred to in effect says, to construe the said special acts of 1859, 1861 and 1865 as irrevocable contracts, binding the Legislature of the State not to alter, amend, repeal or revoke those acts, in so far as they made grants of power to the common council of Chicago. It is true, that the said ruling of the Circuit Court of the United States was made under the influence of the conception, that "plenary (State legislative) power to grant * * * franchises" is State legislative power to make the grant irrevocable for a fixed period of time. But that conception is clearly erroneous and the result of a confusion of thought respecting the doctrine of the Dartmouth College case. Irrevocability by legislative act is not a *necessary* ingredient of a franchise granted by a State. The legislative power of a State, under the doctrine of the Dartmouth College case, to make a grant of a franchise irrevocable by a contract binding the State Legislature not to alter or revoke the grant is not plenary legislative power at all, but is in derogation of plenary legislative power under the common law to grant franchises. The Parliament of England never could make an irrevocable grant of a franchise, yet its legislative power to grant franchises is plenary. The Congress of the United States, in exercising its delegated powers "to establish postoffices and post roads;" "to regulate commerce with foreign Nations, and among the several States, and with the Indian tribes;" "to exercise exclusive legislation in all cases whatsoever over" the District of Columbia; and "to * * * make all needful rules and regulations respecting the territory * * * belonging to the United States," cannot make irrevocable grants of franchises, yet its power to grant franchises "necessary and proper for carrying into execution the foregoing powers" is a plenary or complete power. "When the power to establish post-offices and post roads was surrendered to the Congress, it was a complete power, and the grant carried with it the right to exercise all the powers which made that power effective." And so, when in and by the city's charter of 1863, and the amendatory act of 1867, the State Legislature delegated to the common council power to regulate the use of the streets of Chicago, and power to regulate and control the laying down and use of street railway tracks in those streets, the powers delegated were complete, plenary

powers, and all the more so because the council was forbidden to bind itself, and the State Legislature, by irrevocable contract, not to use the legislative power of the State by altering, amending or repealing an ordinance making a grant of a street railroad franchise. And the charter of 1863 may very well be held, just as the act of 1872 was held, to be a command to the council of Chicago not to act "by contract," under the acts of 1859 and 1861, and the amendatory act of 1867 may very well be held, just as the act of 1872 was held, to be a command to the council of Chicago not to act "by contract," under the act of 1865, if the words, "by contract," in the acts of 1859, 1861, and 1865, do really mean "by irrevocable contract." The Illinois Cities and Villages Act of 1872 is but a re-draft, in the form of a general law, of Chicago's special charters of 1851, 1863 and 1867.

It should be noted that the Circuit Court of the United States, in addition to overlooking Chicago's charters of 1863 and 1867, also entirely overlooked the question as to what effect the present Illinois State Constitution, in force August 8, 1870, had on the subsequent use of the powers granted in and by the said acts of 1859, 1861 and 1865, and entirely overlooked the Illinois Horse and Dummy Act, in force July 1, 1874, which was a general law, applicable to Chicago, although Chicago was then organized under a special charter, and which act unquestionably did, quite as much as, and indeed more than, the Cities and Villages Act of 1872, delegate to Chicago "plenary power to grant or withhold franchises" (*Govin v. Chicago*, 132 Fed. Rep., 848, 854, 860; *Chicago City Railway Co. v. The People*, 73 Ill., 541, 550; *People's Gas Light & Coke Co. v. Chicago*, 194 U. S., 1; *Pearsall v. Great Northern Railroad*, 161 U. S., 646; *Louisville & Nashville Railroad v. Kentucky*, 161 U. S., 677; Illinois Rev. Stat., 1874, Preface, and Horse and Dummy Act, p. 571; *In re Rapier*, 143 U. S., 110; *McCulloch v. Maryland*, 4 Wheaton, 316; *Munn v. Illinois*, 94 U. S., 113, 124; Cooley, Const. Lim., Ed. 6, 200).

XVI. THE CASE OF CHICAGO V. SHELDON DOES NOT HOLD THAT THE STATE LEGISLATURE DID, IN AND BY THE ACTS OF 1859, 1861 AND 1865, EITHER MAKE, OR AUTHORIZE CHICAGO TO MAKE, IRREVOCABLE GRANTS.

The chief basis of support for the proposition that ordinances, passed by the common council of Chicago prior to August 8, 1870, making grants of the right to lay down and use street railroad tracks in the streets of Chicago, operate as irrevocable contracts, under and by virtue of the said special acts of 1859, 1861 and 1865, appears to be not the language used in those acts, expounded under the guidance of the established rule of resolving all reasonable

and rational doubts against the claim of power in a municipal body to make irrevocable contracts, but a judgment rendered by the Supreme Court of the United States at the December term, 1869, in the case of *Chicago v. Sheldon*, 9 Wallace, 50, a case that arose out of the judgment of the Supreme Court of Illinois, rendered at the April term, 1866, in the case of *Chicago v. Baer*, 41 Ill., 306. Does that case of *Chicago v. Sheldon* support the proposition? Let it be examined.

May 23, 1859, the common council of Chicago passed an ordinance making a grant to the North Chicago City Railway Company, created, as above stated, by the said special act in force February 19, 1859, of the right to lay down and use horse railroad tracks in North Clark street. July 27, 1865, the common council passed an ordinance requiring North Clark street to be curbed with stone and paved with wooden blocks known as the Nicholson pavement, the cost of the improvement to be paid by special assessment levied against the property benefited. The commissioners of the board of public works of Chicago fixed the district that would be benefited by the improvement, and apportioned the cost of it upon the parcels of property lying within the district. The common council approved the report, and on October 16, 1865, a warrant was issued for the collection of the assessment. At the February term, 1866, of the Superior Court of Chicago, the collector applied for a judgment against the parcels of property the assessment on which had not been paid. The owners appeared and objected to the entry of judgment; on the ground that the roadway of the North Chicago City Railway Company in North Clark street would be benefited by the new curbing and paving of the street, but no part of the cost had been assessed against the roadway of that company. The Superior Court of Chicago sustained the objection, and on appeal the Supreme Court of the State affirmed the judgment (*Chicago v. Baer*, 41 Ill., 306). The company claimed an exemption or immunity from the assessment on the ground that the said ordinance of May 23, 1859, on its true construction, was a *contract* binding the company to keep the pavement between their tracks on North Clark street in good condition and repair in consideration of an exemption or immunity from any special assessment to pay the cost of an entirely new pavement. The Supreme Court of the State did not stop to consider whether such was the true construction of the ordinance of May 23, 1859, but held the ordinance, so construed, to be utterly void, because prohibited by the Constitution of 1848, as expounded in the case of *Chicago v. Larned*, 34 Ill., 265, in 1864, wherein it was ruled that, under the Constitution of 1848, a special assess-

ment is not a tax, but an exercise of the power of eminent domain, but, in ascertaining the just compensation enjoined by the Constitution, the rule of equality and uniformity by which the taxing power was expressly limited by the Constitution of 1848 must be observed. It was also ruled in *Chicago v. Larned* that the levying of a special assessment under the Constitution of 1848 must be a judicial, and not a legislative, proceeding. On the rendition of the judgment in *Chicago v. Baer*, a portion of the cost of the new curb and pavement for North Clark street was assessed against the roadway of the North Chicago City Railway Company, the amount of the assessment being \$28,677. Thereupon, one Sheldon, a stockholder in the company,—the company itself having declined to act—filed a bill in the Circuit Court of the United States to enjoin the collection. The Court enjoined it, and Chicago took the case into the Supreme Court of the United States on writ of error. It does not expressly appear, but it may be safely assumed, that Sheldon was not a citizen of Illinois and that the jurisdiction of the courts of the United States rested on the ground that the controversy was between citizens of different States. It is stated (9 Wallace, 52) that the “main question” was “whether under their contract to keep the road, for a certain number of feet ‘in good condition and repair,’ the company could be made to pay for what was a new curbing, grading, and paving, altogether, there being also some minor questions as to the decisions” of the Supreme Court of Illinois in *Chicago v. Larned* and *Chicago v. Baer*. The “main question,” the construction of the ordinance of May 23, 1859, was decided in favor of the company. Then the “minor question” whether the Federal Supreme Court was bound to follow the decision of the State Supreme Court in *Chicago v. Baer* came up. It was said that the Federal Supreme Court was not concerned to deal with the question whether the Illinois Constitution of 1848 was rightly or wrongly expounded in 1866 by the State Supreme Court in *Chicago v. Baer*, because in three cases, decided in 1855 and 1863 (*Illinois Central R. Co. v. McLean County*, 17 Ill., 291; *Hunsaker v. Wright*, 30 Ill., 146; *Newstadt v. Illinois Central R. Co.*, 31 Ill. 484), the Supreme Court of the State had decided that the State Legislature could, consistently with the State Constitution of 1848, exempt corporations and individuals from general taxation in consideration of a payment of money, or other equivalent, into the public treasury, the Legislature being the exclusive judge of the value of the equivalent exacted. These State decisions were standing unreversed at the date of the passage of the ordinance of May 23, 1859, and that ordinance operating as *a contract*, it was held that *the contract*

could not be *invalidated* by a decision of the highest court of the State, made after its passage, in effect, in the view of the Federal Supreme Court, overruling the earlier State decisions.

Does that case of *Chicago v. Sheldon* hold that the ordinance of May 23, 1859, was an unalterable and irrevocable contract? How could it? That it was *a contract* was not, and could not have been, denied either by counsel or by the Court. But the question whether the contract was *revocable* or *irrevocable* could not possibly have arisen unless the State Legislature, or the common council of Chicago, by virtue of delegated power, had passed a law altering or revoking some part of it. The ordinance authorizing the improvement was passed July 27, 1865, after the taking effect of an amendment of Chicago's charter of 1863, on February 15, 1865 (Private Laws, Ill., 1865, Vol. 1, p. 274, Sec. 1), designed to give the spreading of a special assessment the character of a judicial proceeding enjoined by the decision in *Chicago v. Larned*, by requiring the commissioners "to assess the amount directed by the common council to be assessed *upon the real estate by them deemed benefited by any such improvement*, in proportion, as nearly as may be, *to the benefit resulting thereto*," instead of "on the real estate *fronting or abutting* on the contemplated improvement" under a *front foot rule of apportionment* (Charter of 1863, Ch. VII, Sec. 21, 1 Private Laws, 1863, p. 89; *Chicago v. Larned*, 34 Ill., 403; *Chicago v. Baer*, 41 Ill., 306, 314). Now, when it is remembered that the levying of this special assessment under the ordinance of 1865 was a judicial, and not a legislative, proceeding, there was no subsequent State law before the Court that *could* impair the obligation of the contract, nor was any such point advanced by counsel for Sheldon, Mr. Benjamin R. Curtis, formerly Mr. Justice Curtis of the Supreme Court of the United States, and Mr. William C. Goudy. Their contention was: "Such contract is *valid*" (*Chicago v. Sheldon*, 19 L. Ed., 594, 595). The rendition of a judgment by a State court is not the passage of a law, within the meaning of the prohibition that "No State shall pass any law impairing the obligation of contracts" (*Railway Co. v. Rock*, 4 Wallace, 177; *Weber v. Rogan*, 188 U. S., 10). *Chicago v. Sheldon* is, therefore, but an example of the application of the rule in the case of *Gelpcke v. Dubuque*, 1 Wallace, 175, decided in 1863, that when the meaning of the Constitution of a State is established by a decision of the highest court of the State, at the time a contract is entered into, in favor of the *validity* of the contract, the contract cannot afterwards be held *invalid*, even by a court which should be of opinion that the former construction of the State Constitution by the highest court of the State was

wrong (The case of *Gelpcke v. Dubuque*, 4 Harv. Law Rev., 311; *Prettyman v. Tazewell County*, 19 Ill., 406; *Marshall v. Silliman*, 61 Ill., 218, 221). Whether the rule was rightly applied in *Chicago v. Sheldon* may perhaps be doubted, if for no other reason, in view of the wide difference that has always existed in Illinois between the subject of general taxation, involved in the earlier State decisions, and the subject of special assessment, involved in the later State decisions (*Illinois Central R. Co. v. Decatur*, 147 U. S., 190; *West River Bridge Co. v. Dix*, 6 Howard, 541; *Village of Hyde Park v. Cemetery Association*, 119 Ill., 141, 148; *Chicago v. Chicago Union Traction Co.*, 199 Ill., 259, 270). But, necessarily, the Federal Supreme Court must have reached the same result in *Chicago v. Sheldon* whether the contract evidenced by the ordinance of May 23, 1859, was *revocable* or *irrevocable*, because, until revoked by legislative act, it was just as *valid*, obligatory and binding, and just as much entitled to enforcement by a court, as if it was irrevocable. No one can affirm that the act of 1859 of the Legislature of Illinois, involved in *Hunsaker v. Wright*, 30 Ill., 146, one of the earlier State decisions cited in *Chicago v. Sheldon*, exempting real and personal property within the limits of the city of Cairo, on certain conditions, from taxation for county purposes, constituted an irrevocable contract (*City of Worcester v. Worcester Street R. Co.*, 196 U. S., 539), yet that act being held good, had to be enforced by the court until the Legislature saw fit to alter or repeal it. It is true that Mr. Justice Nelson did say in *Chicago v. Sheldon* that "it is not competent for its (the State's) Legislature to pass an act impairing its obligation," (*i. e.*, of the contract, evidenced by the ordinance of May 23, 1859), but this was only to illustrate and enforce the main proposition that the Federal Supreme Court would not give effect to the later State decisions invalidating the contract. Mr. Justice Nelson also said: "A point is made that the Legislature have not conferred, or intended to confer, authority upon the city to make this contract. We need only say that full power was not only conferred (by the said special act of 1859), but that the contract has been since ratified by this body" (by the said special act of 1865). But, for the reasons stated, it is not permissible, I think, to insert the word "irrevocable," rather than the word "revocable," before the word "contract," in this language of the learned Justice.

I think, therefore, that the case of *Chicago v. Sheldon* lends no support at all to the proposition that the common council of Chicago got power, out of the said special acts of 1859, 1861 and 1865, to make irrevocable contracts respecting the use of the streets of Chicago for street railroad purposes.

XVII. THE DOCTRINE OF THE SUPREME COURT OF ILLINOIS APPEARS TO BE THAT CHICAGO COULD GRANT ONLY LICENSES UNDER SAID ACTS OF 1859, 1861, 1865.

In *Chicago v. Baer*, 41 Ill., 306, 312, Mr. Justice Lawrence did say that "it is true, *as urged by counsel*, that the (North Chicago City) railway company * * * has certainly, through its charter from the Legislature, and *its contract* with the city, acquired a property in these streets of the most valuable character, which neither the Legislature nor the city can take away against the consent of the company, and capable, like other property, of being sold and conveyed" (pp. 313, 312). Counsel for the city apparently urged this in reply to the argument of opposing counsel that the company's property was not of a nature to be assessable for a local improvement. But the statement plainly is not *decision*. The Court said: "It is wholly unnecessary to define, for the purpose of this case, what is the precise extent or nature of its property" (p. 313). The position of this sentence in the opinion makes it look very much as if it was inserted by the writer of the opinion at the instance of the Court.

Those special acts were before the Supreme Court of Illinois at the September term, 1874, in the case of *Chicago City Railway Company v. The People*, 73 Ill., 541. The question was as to the *validity* of, that is to say, *the power of the council to pass*, an ordinance passed by the common council of Chicago on November 13, 1871, after the taking effect of the present Constitution on August 8, 1870, making a grant to the Chicago City Railway Company of the right to lay down and use street railroad tracks in Indiana avenue. The ordinance was clearly *valid*, because, as above shown, the council had express power to pass it under Chicago's charter of 1863, as amended in 1867. But neither Court nor counsel noticed Chicago's charter, and both Court and counsel assumed that the common council's sole and exclusive source of power to pass the ordinance was the said special acts of 1859 and 1865, and so, as the case was viewed, the *validity* of the ordinance hinged entirely upon its *legal effect*. Counsel on both sides assumed that the *legal effect* of the ordinance was to make an irrevocable grant of a franchise, and the issue debated at the bar was, whether the Constitution of 1870 stripped the council of power to make irrevocable grants of street railroad franchises under those acts. Three Justices ruled that it did. Four Justices, of their own motion, apparently, ruled that the ordinance of November 13, 1871, was only a waiver of a forfeiture of a prior ordinance, passed August 22, 1864, of like import, the forfeiture having accrued by reason of the non-performance by the railway company of a con-

dition in the ordinance of August 22, 1864, that the track be laid in Indiana avenue within fifteen months after the passage of the ordinance, and that the common council had the power, on November 13, 1871, to waive the forfeiture, even without any act of the Legislature, in force on November 13, 1871, delegating to it power, or "enabling" it, to waive such forfeiture. The majority also ruled that the taking effect of the new State Constitution on August 8, 1870, did not destroy the right of the company to use, after August 8, 1870, the rights and privileges granted by the ordinance of August 22, 1864, because that ordinance, though perhaps a *contract*, within the meaning of the word "contract" in said special Acts of 1859 and 1865, was yet only a grant of "a mere license." The reason given for this last result was that, under Blackstone's definition of a franchise, the sovereign law-making power in the State alone, i. e., the State Legislature, can grant a franchise, and, under the ruling of the Court of Appeals of New York in the case of *Davis v. The Mayor*, above referred to, "a municipal body, it is understood, possesses no power to confer a franchise" (*Chicago City Railway Co. v. The People*, 73 Ill., 541, 547, 548, 549).

Here, then, in September, 1874, is at least a clear expression of opinion by a majority of the highest court of the State of Illinois to the effect that, on August 22, 1864, the common council of Chicago had no power, under and by virtue of the special act of 1859, to grant to the Chicago City Railway Company, created by that act, anything more than "a mere license" to lay down and use horse railway tracks in Indiana avenue in Chicago, which means, if it means anything, that the license was revocable, and was not, and could not be made, irrevocable by the council because the ordinance granting it did not "emanate from any source competent to grant a franchise." It is not clear, and it is not very material, I think, whether the majority meant to say that the State Legislature merely *did not*, or whether they meant to say that the State Legislature *could not*, in 1859, delegate power to the common council of Chicago to make an irrevocable grant to a street railroad company of the right to use a public street.

XVIII. THE DOCTRINE OF THE CIRCUIT COURT OF THE UNITED STATES RESPECTING ORDINANCES PASSED BY CHICAGO UNDER THE ACTS OF 1859, 1861, 1865, IS IN ACCORD WITH THE DOCTRINE OF THE STATE SUPREME COURT, AND ITS DOCTRINE THAT SAID ACTS MADE A DIRECT IRREVOCABLE GRANT IN THE NATURE OF A FLOAT IS EITHER WRONG OR OF LITTLE PRACTICAL IMPORTANCE.

In 1904, in the case of *Govin v. Chicago*, 132 Fed. Rep., 848, the question of the legal effect of ordinances passed by the common council of Chicago prior to August 8, 1870, making grants of the

right to lay down and use street railway tracks to the North Chicago City Railway Company and the Chicago West Division Railway Company, organized under said Acts of 1859, 1861 and 1865, was considered by the Circuit Court of the United States for the Northern District of Illinois. The Court ruled that all the power the common council of Chicago got out of those acts was power to designate the streets in which the corporations organized under those acts might exercise and use their abstract corporate power or capacity, conferred by the acts, to construct, maintain and operate street railroads, and when, pursuant to such designation by the council, the corporations acted by making the effects of the abstract power visible in the shape of iron rails, cars moving thereon with wheels, propelled by horses and mules, the result was the same as if the State Legislature had named the streets in words in the Acts of 1859, 1861 and 1865. The Court said: "The language used in the section under consideration (Section 2 of the Act of 1859, above quoted) constituted a clear and definite grant of authority to the companies to occupy the streets—a grant direct, and not by circumlocution; a grant by the Legislature to the companies, not the grant of power to the city to grant in turn to the companies. True, the streets to be used are not set out by name; but they are set out by description, a description that fixes with certainty their identity as to the then past, and with equal certainty the means of identity as to the then future (the index finger of the common council of Chicago), and it is a universal maxim of law that that is certain that can be made certain. True, also, that the grant is in the nature of a float, not attaching to any specific street until such street has been designated (by the common council), but when the street has been designated, the grant attaches as of the date of the act. In that sense the grant is *in praesenti*" (as of February 19, 1859).

The Court, by implication at least, concedes that its result is not justified by the words of the acts alone, but maintains that its result is warranted by the words of the acts read in the light of "the then (1859-1865) prevailing idea respecting railway grants." The Court said: "In the interpretation of all statutes that come to us from a considerable past, we must look not only to the language actually used but to the historical relation out of which the language comes, as also the interpretation put upon like language by courts speaking at, or about, that period." The Court then states the results of its researches into "the historical relation, out of which the language" of the Acts of 1859, 1861 and 1865 came, and into "the interpretation put upon like language by courts speaking at, or about, that period," as follows: "At first it was

thought that under their general power over streets, the municipalities in whose streets street railways were to be laid might have power to authorize the construction of such roads. But this view was quickly dissipated by the courts; with unanimity, the courts by such municipality, to grant a franchise to a street railway com- decided that the Legislatures of the States, alone, possessed such power; that the municipality had no such power; and that the power could be exercised by the Legislature without the consent of the municipality, or even a reference to its wishes. *State v. Mayor of New York* (1854), 3 Duer., 119; *Chicago v. Evans* (1860), 24 Ill., 52; *People's R. Co. v. Memphis R. Co.* (1869), 10 Wall., 38. In the latter case, the Supreme Court of the United States said:" Then follows a quotation from the opinion of Mr. Justice Clifford, and the Court concludes: "In general, the court (in the case last cited) held that the municipality (Memphis, Tenn.) had no power, in virtue of the ordinary powers possessed pany to use its streets; and even doubted whether such power could be constitutionally delegated by the Legislature to the municipality. Those and other cases (not cited) show the ideas of public policy then held, relative to the sources from which street railway companies obtained their rights to use streets for railway purposes."

The error the court fell into, I think, was this: In its re- searches into the past, it failed to discriminate between the power of a municipal corporation to make an *irrevocable* grant of the right to use a public street for street railroad purposes, and its power to make a *revocable* grant. Power in a municipal corpora- tion to make such an *irrevocable* grant *was* denied by the courts, "with unanimity," *unless* a statute passed by the State Legislature delegating to a municipal corporation the power, in clear and un- ambiguous words, was produced. But power in a municipal cor- poration to make a *revocable* grant *was not* denied by the courts, "with unanimity." In April, 1859, the Supreme Court of Illinois, speaking by Mr. Chief Justice Caton, ruled, as above stated, that the common council of Chicago had the power, under its charter of 1851, to grant the right to lay down and use both steam and horse railroad tracks in the streets of Chicago, and said though there were contrary rulings in other States, yet the "weight of authority, and certainly, in our apprehension, all good reasoning" supports the ruling made (See *Davis v. The Mayor*, 14 N. Y., 506, 508, 523, 529, 533; *Memphis R. Co. v. People's R. Co.*, 10 Wallace, 38, 50-53, and cases cited, 56; Chicago's Charters of 1851, 1863 and 1867; Birmingham Street R. Cases, 79 Ala., 465, 470, and cita- tions).

In *Chicago v. Baer*, 41 Ill., 306, 313, in April, 1866, the State Supreme Court said that the North Chicago City Railway Company got its right to occupy a certain portion of North Clark street in Chicago by its ties, rails and cars, so far as may be necessary for operating the railway, out of ordinances of the council of Chicago, and not out of the Acts of 1859 and 1865 (See *Chicago City Railway v. The People*, 73 Ill., 541; *Chicago v. Sheldon*, 9 Wallace, 50; Opinion of Mr. Justice Curtis, cited 114 U. S., 507-8; *State v. Gas Co.*, 18 Ohio State, 262, 293, cited in 172 U. S., 9).

So far as I can find, the theory that the acts of 1859, 1861 and 1865 made a direct irrevocable grant, "in the nature of a float," of the right to use a street in Chicago for street railroad purposes was not developed until the case of *Govin v. Chicago* was decided in May, 1904.

In this connection, it is worthy of notice that the Legislature of New York, in 1860, when it wanted to make a direct irrevocable grant of the right to use streets in New York city for street railroad purposes, specifically enumerated the streets in the act that it passed (*People v. Kerr*, 27 N. Y., 188; compare, *Davis v. Mayor* 14 N. Y., 506; *Malhau v. Sharp*, 27 N. Y., 611).

But in *Govin v. Chicago* the Court did, as I think, rule strongly that the common council of Chicago had no power whatever, under and by virtue of the acts of 1859, 1861 and 1865, to make irrevocable grants of the right to lay down and use street railroad tracks in the streets of Chicago for a fixed period of ninety-nine years.

The Court conceded, as I think, that the language of the acts alone, unaided by extrinsic considerations, would not justify its ruling that the Legislature made "a direct grant in the nature of a float," and pinned the legal merit of its ruling upon the question of the correctness of the Court's conception of "the then (1859-1865) prevailing idea respecting railway grants." With all due deference, I think the Court's conception is not only not supported by the printed evidence, but is directly contradicted by the evidence of the principal reported decision cited in its support—*People's R. Co. v. Memphis R. Co.*, 10 Wallace, 38, 19 L. Ed., 844, and by the very words of the acts the Court was construing.

It may be that there are expressions in the majority opinion in *Chicago City Railway Co. v. The People*, 73 Ill., 541, which could be used to support the proposition that the said acts made a direct irrevocable grant in the nature of a float, but they have not been so used, and the result reached in the case is against the proposition.

Then, as above stated, if the acts did make a direct irrevocable grant, in the nature of a float, one is brought face to face with the

question whether Chicago's charters of 1863 and 1867 and the State Constitution of 1870, in force August 8, 1870, did not end, or revoke, the capacity of the grant to float over the streets of Chicago any longer. That such was the effect of the said charters and of the Constitution would appear to be a sound proposition (*Govin v. Chicago*, 132 Fed. Rep., 848, 858-860; *Chicago City Railway Co. v. The People*, 73 Ill., 541, minority opinion).*

XIX. THE DOCTRINE OF THE DARTMOUTH COLLEGE CASE HAS LITTLE, IF ANY, APPLICATION TO THE STREET RAILROAD CORPORATIONS OF CHICAGO DOWN TO AUGUST 8, 1870.

For the reasons aforesaid, the State Legislature did not, at any time prior to the taking effect of the present State Constitution on August 8, 1870, make irrevocable grants or contracts respecting the right to lay down and use street railroad tracks in the streets of Chicago, either directly or indirectly, by delegating power to the common council of Chicago to make such irrevocable grants. But if the special acts of 1859 and 1861 did authorize the common council to make irrevocable grants, the authority was taken away by the charter of Chicago of 1863, and if the act of 1865 restored the authority, that restored authority was taken away by the amendment of the charter in 1867. And on any view, irrevocable grants, if made prior to August 8, 1870, being few in number, are negligible things.

Revocable grants made prior to August 8, 1870, may be revoked by the State Legislature, at its own will and pleasure, and by the city council of Chicago for good and just cause. The reason for the difference between the State's power of revocation and the city's power of revocation by legislative act will appear hereinafter.

XX. AUGUST 8, 1870, THE DATE OF THE TAKING EFFECT OF THE PRESENT STATE CONSTITUTION, THE DOCTRINE OF THE DARTMOUTH COLLEGE CASE CEASED TO BE THE LAW IN ILLINOIS.

It only remains to inquire whether, under the present State Constitution, the State Legislature can make, and has made, or can authorize, and has authorized, the city council of Chicago to make, irrevocable grants or contracts respecting the right to use the streets of Chicago for street railroad purposes for a fixed term of years.

Section 14 of Article II—the Bill of Rights—of the Constitution of 1870 says: "No * * * law making any irrevocable

NOTE:

*It is not clear that the opinion in *Govin v. Chicago* is entitled to rank as a judicial opinion, because the record in the case raises a grave doubt as to whether the Court had any jurisdiction.

grant of special privileges or immunities shall be passed." The whole section reads: "No *ex post facto* law, or law impairing the obligation of contracts, or making any irrevocable grant of special privileges or immunities, shall be passed." What does that short, general mandate—"No law making any irrevocable grant of special privileges or immunities shall be passed"—mean? Can there be any rational doubt as to its meaning? *Noscitur a sociis*—it is known from its associates. It excepts from the operation of the obligation of contracts clause all laws thereafter passed making grants of special privileges, and, by prohibiting only irrevocable grants, sanctions revocable grants, of special privileges. That a law making a grant of the right to lay down and use street railroad tracks in the streets of Chicago makes a grant of a special privilege cannot be doubted (*Bank of Augusta v. Earle*, 13 Peters, 519, 595; *Davis v. The Mayor*, 14 N. Y., 506). That an ordinance of the city council of Chicago making such a grant is a law cannot be doubted (*Tudor v. Rapid Transit R. Co.*, 154 Ill., 129, 136; *People v. Suburban R. Co.*, 178 Ill., 594; *Hayes v. Railroad Co.*, 111 U. S., 228; *Davis and Farnum Mfg. Co. v. Los Angeles*, 189 U. S., 207, 216). The Supreme Court of the United States has decided that a mandate in the Constitution of Ohio of 1851 that "No special privileges or immunities shall ever be granted that may not be altered, revoked, or repealed by the General Assembly," as applied to corporations, is at least the equivalent of the more usual provision reserving power to alter, amend, or repeal corporate charters (*Shields v. Ohio*, 95 U. S., 319, 324; *Hamilton Gas Light and Coke Company v. Hamilton City*, 146 U. S., 258, 269; see also *The Birmingham Street Railroad Cases*, 79 Ala., 465, 473; *City of Houston v. Houston Street R. Company*, 19 So. W. Rep. (Texas), 127, 129; *Atchison St. R. Co. v. Missouri Pacific R. Co.*, 3 Pac. Rep., 284, Kansas, Brewer, Judge; *North Springs Water Co. v. Tacoma*, 58 Pac. Rep., 773, 775, column 1, 778, column 2, Washington), and the same Court has also decided that the Legislature of Massachusetts could, under such reserved power to alter or repeal in existence at the date of the grant, revoke and annul the right of a street railroad company, resting upon a direct grant of the State Legislature, to lay down and use street railroad tracks in the streets of Boston, and could authorize the laying down of new tracks by a new company over identically the same ground occupied by the old tracks of the old company (*Greenwood v. The Freight Co.*, 105 U. S., 13; see also *Bridge Co. v. U. S.*, 105 U. S., 470; *Sinking Fund Cases*, 99 U. S., 700).

The mandate in the Illinois Constitution is not confined to grants of special privileges to corporations, but applies as well to

such grants to individuals; nor does it, like that in the Ohio Constitution, mention any law-making authority, but it is addressed to every authority in the State clothed with any part of the legislative power of the people of the State. As originally proposed the mandate was directed to the General Assembly. In the Report of the Committee on Bill of Rights, it read: "The General Assembly shall not * * * make any irrevocable grant of special privileges or immunities" (2 Debates in C. C. of 1870, 1558), was so adopted (2 Debates, 1586), was so referred to the Committee on Revision and Adjustment (2 Debates, 1590), but came out of that Committee, and was ordered enrolled, in the form in which it now appears in the Constitution (2 Debates, 1778).

By this mandate, and by inserting it in the Bill of Rights, the framers of the Constitution intended to affirm the rule of equality before the law-making power of the State, the most striking exceptions to which, in this country, prior to 1870, after the abolition of slavery, were holders of special privileges granted by a State irrevocably placed upon a pedestal above and beyond the reach of the State by the doctrine of the Dartmouth College case. "The State was stripped, under this interpretation (of the obligation of contracts clause of the Federal Constitution in the Dartmouth College case) of prerogatives that are commonly regarded as inseparable from sovereignty, and might have stood, like Lear, destitute before her offspring, had not the police power (and the reserved power to alter or repeal or revoke) been dextrously declared paramount, and used as a means of rescinding improvident grants" (1 Hare, Am. Const. Law, 606, 607). Speaking in opposition to a motion made in the Illinois Constitutional Convention to change the mandate so as to prohibit the making of irrevocable grants of special privileges only "by special law," Mr. Church said: "I regard the amendment offered by the gentleman from Adams (Mr. Skinner) as striking at the very heart of the Constitution that we propose to make, so far as regards the relations we propose to allow to exist between the people of this State, and corporations hereafter to be created. I concede that for one, that in the insertion of this clause in the Bill of Rights, I did mean, and such I believe to have been the meaning of the whole Committee, to strike out the very power of the Legislature hereafter to ever grant any corporate privileges whatever, but such as should be subject to law" (2 Debates, 1585). Mr. Skinner's motion was lost by a vote of ten yeas to thirty-eight nays; absent and not voting, thirty-five (2 Debates, 1586). To enforce his said view of what this mandate would do for Illinois, and his further view thus expressed—"It, sir, is a very fatal error that the gentle-

man has fallen into, and that many other public spirited men have fallen into, * * * that to reserve the control of * * * corporations in the sovereign power of the State will be to discourage the investment of capital. * * * I do not believe, sir, that such will be, or ever has been, the effect"—Mr. Church referred to "our sister State of Wisconsin" as a State where the people had long ago done what this mandate would do for Illinois, and where invested capital was just as secure as it ever was in Illinois. Turning to the Wisconsin Constitution of 1858, we find therein this provision: "All general laws or special acts enacted under the provisions of this section (for the formation of corporations) may be altered or repealed by the Legislature at any time after their passage" (Article XI, Section 1). In 1874 we find the great Chief Justice of Wisconsin, in the case of *Attorney General v. Railroad Companies*, 35 Wis., 425, 569-574, reviewing the previous decisions of the Supreme Court of Wisconsin expounding this clause of the Constitution, and stating "the unanimous opinion of this Court, always, in all cases before it" thus: "By force of the constitutional power reserved and of the uniform construction and application of it, the rule in the Dartmouth College case, as applied to corporations, never had place in this State, never was the law here. The State emancipated itself from the thralldom of that decision, in the act of becoming a State; and corporations since created here have never been above the law of the land. Subject to this reserved right, and under the rule in the Dartmouth College case, charters of private corporations are contracts, but contracts which the State may alter or determine at pleasure. Contracts of that character are not unknown in ordinary private dealings; and such we hold to be the sound and safe rule of public policy. It is so in England. It is so under the Federal Government itself. The material property and rights of corporations should be inviolate, as they are here; but it comports with the dignity and safety of the State that the franchises of corporations should be subject to the power which grants them, that corporations should exist as the subordinates of the State, which is their creator, *durante bene placito*" (p. 574; see also *Peik v. Chicago and N. W. R. Co.*, 94 U. S., 163, 175).

In order to bring as nearly as possible to "the common level" enjoined for the future by this general mandate in the Bill of Rights, all those who might have previously got above it by grants of franchises and privileges, "improvidently yielded by the State," the framers of the Constitution of 1870 inserted into it many particular and special provisions to discourage and stop any further growing up of "a growth within us that has risen above us" (2

Debates, 1586). Article IV, Section 22, provides: "The General Assembly shall not pass local or special laws granting to any corporation, association or individual the right to lay down railroad tracks, or amending existing charters for such purpose; granting to any corporation, association or individual any special or exclusive privilege, immunity or franchise whatever." Article IX prohibits the granting of any irrevocable exemption from taxation: Article XI, Section 1, provides that "No corporation shall be created by special laws, or its charter extended, changed or amended, * * * but the General Assembly shall provide, by general laws, for the organization of all corporations to be hereafter created," and Section 2 provides: "All existing charters or grants of special or exclusive privileges, under which organization shall not have taken place, or which shall not have been in operation within ten days from the time this Constitution takes effect, shall thereafter have no validity or effect whatever." Section 12 declares railways heretofore or hereafter constructed to be "public highways," and Section 14 says: "The exercise of the power and the right of eminent domain, shall never be so construed or abridged as to prevent the taking, by the General Assembly, of the property and franchises of incorporated companies *already organized*, and subjecting them to the public necessity the same as individuals." This limitation to companies "already organized" is significant. Under the prohibition in the Bill of Rights that "No law making any irrevocable grant or special privileges or immunities, shall be passed," the franchises of corporations subsequently organized could be taken by a legislative revocation, but those of companies already organized might "require the exercise of a power based upon other contingencies than the more common principles of legislation" (2 Debates, 1586). It was not an unusual argument in the '70s that a State does not need the power to revoke franchises, or privileges granted by it, "because all the power which the State needs, she possesses under the power of eminent domain—that is to say, that a State having been deprived by fraud of her prerogatives, has the privilege of buying them back" (8 Am. Law Rev., 238). Section 15 says: "The General Assembly shall pass laws to correct abuses and prevent unjust discrimination and extortion in the rates of freight and passenger tariffs on the different railroads in this State, and enforce such laws by adequate penalties, to the extent, if necessary for that purpose, of forfeiture of their property and franchises."

Can there be any doubt whatever that "Equality of privilege is the principle of the Constitution of 1870" (Mr. Justice Sheldon in *Chicago City Railway Company v. The People*, 73 Ill., 541, 558)?

And the meaning of that principle is that irrevocable special privileges cannot arise and exist in Illinois after that Constitution took effect. In other words, that the doctrine of the Dartmouth College case is not the law in Illinois, except as respects irrevocable grants of privileges made before, and put in operation within ten days after, August 8, 1870. Every one knows that no corporation organized in Illinois since the taking effect of the present Constitution can get from the Legislature directly any powers, privileges or franchises that the Legislature may not alter or revoke by a general law. The State's power of alteration or revocation is commonly rested upon the ninth section of the General Incorporation Act of 1872, which says: "The General Assembly shall, at all times, have power to prescribe such regulations and provisions as it may deem advisable, which regulations and provisions shall be binding on any and all corporations formed under the provisions of this act. *And, provided, further,* that this act shall not be held to revive or extend any private charter or law heretofore granted or passed concerning any corporation." But this section is only a contemporaneous legislative enactment of the rule of the Constitution as applied to corporations. Is it possible to believe that the people of Illinois, on August 8, 1870, stripped their State Legislature of power to make irrevocable grants of special privileges, but left it with power to authorize the legislative authorities of cities, towns and villages throughout the State to make such irrevocable grants to local public service corporations?

The mandate—"No law making any irrevocable grant of special privileges or immunities shall be passed"—as above stated, sanctions the passage of laws making revocable grants of them. What authority may exercise the power of revocation? It must be a legislative authority, because, even under the doctrine of the Dartmouth College case, special privileges are revocable by the courts after a judicial inquiry establishing gross misuse or abuse of them, and the Constitution, therefore, would be meaningless, if construed as authorizing a judicial authority to exercise the power of revocation. There can be no doubt whatever that the highest legislative authority of the State, the General Assembly, can exercise the power. But it must act by a "general" law (Constitution of 1870, Art. IV, Sec. 22; Art. XI, Secs. 1, 2).

As respects the particular special privilege of laying down and using street railroad tracks in the streets of Chicago, would an act of the General Assembly revoking a particular grant made by the council of Chicago to a particular street railroad company since August 8, 1870, be a general law? I think it would be, unless a court could say that any man of aver-

age sense in the community at the date of the act of revocation would pronounce it repugnant to the principle of equality before the law. A single street railroad company in a single city may, by its own conduct, put itself into a class by itself as respects the question whether its privileges should be revoked by legislative act. Events over which it has no control, and for which it may not be at all responsible, may single it out for legislative decapitation, as, for example, the expressed wish of the required number of the electors to have the city avail itself of a delegated power to own street railroads and to operate them by public officers and employees.

But if the Constitution of Illinois forbids the State Legislature to exercise its power of revocation of grants of the right to lay down and use street railroad tracks in public streets by using it from time to time in single instances in single cities or towns in the State, then it follows that the mandate to act by a general law operates practically to strip the State Legislature of the right to use the power of revocation justly and beneficially at all in the case of street railroad companies, except by a general law delegating the right to use the power to municipal corporations.

But if it be conceded that the State Legislature can revoke the privileges of a single street railroad company in a single city, it does not follow that a similar power of revocation does not reside in the legislative authority of the city. The Constitution of 1870 itself makes the laying down and use of street railroad tracks in public streets a local matter, a subject of local government, because it forbids the Legislature to grant the right without requiring the consent of the local authorities (Article XI, Section 4). In the case of a corporation, as above stated, the Legislature only creates an abstract person and qualifies that abstract person to ask for, and to receive, the consent of the local authorities, and it is the giving of that consent by ordinance which creates or grants the right to lay down and use street railroad tracks in public streets. Since the local authorities, under the Constitution, alone can grant the right by the passage of a law, and since the Constitution says that "No law making any irrevocable grant of special privileges or immunities shall be passed," it results that the Constitution itself gives the local authorities power to revoke the grant, and that the State Legislature cannot take that power of revocation away from them. Hence, the Constitution itself clothes the city council of Chicago with power to revoke a grant made by it of the right to lay down and use street railroad tracks in the streets of Chicago, and forbids the council to bind itself by irrevocable contract not to use that power for twenty years, twenty

days or twenty minutes. It is a continuing and inalienable power of legislation. Besides, the State Legislature has never attempted to take that power of revocation away from cities, but has delegated the power to them by statutes hereinafter referred to.

There is, however, I think, this difference between the State Legislature's reserved power of revocation and the city council's reserved power of revocation. When the State Legislature uses the power in a given instance, the causes or abuses which induced the exercise of the power cannot be drawn in question before any court. The reserved power of the Legislature is a political power, and it results from the separation of the three departments of the government, and from the independence of each, that the judicial department must presume conclusively that the occasion was sufficiently grave and solemn to justify the legislative department in putting forth its reserved power of revocation (*Greenwood v. Freight Co.*, 105 U. S., 13; *Hamilton Gas Light Co. v. Hamilton City*, 146 U. S., 258, 269; *Bridge Company v. U. S.*, 105 U. S., 470). But when the city council uses its reserved power of revocation in a given instance, the causes and abuses which induced the exercise of the power may be inquired into by a superior court of justice of the State. Such court and the city council are not co-ordinate authorities, but the relation is that of a superior, paramount authority and an inferior, subordinate authority. The city council acts only by delegation from the central State government, and is at all times accountable to its superior for the use that it makes of its delegated powers. This is because of the principle of the omnipotence or supremacy throughout the whole State of the central State government, except where the State or Federal Constitution lays down a different principle (*Chicago v. Cicero*, 210 Ill., 290; Dicey, *Law of the Constitution*, Ed. 4, Ch. IV, 173). It results from this principle that the superior courts of the State, representing the central State government, have power to guard the peace and quiet of cities, towns and villages in the State and the inhabitants thereof against abuses by local officials of their delegated powers held *in trust*. And it is familiar law that a State court in Illinois has the power to declare a municipal ordinance void, even though the municipality had the mere power to pass it, and even though the ordinance is not repugnant to the letter of any written constitutional or statutory provision, if it will yet be, in actual operation and effect, repugnant to a generally accepted standard of right and justice, works considerable harm and plainly does no one in the world any substantial good whatever.

XXI. THE SUPREME COURT OF ILLINOIS AND THE DARTMOUTH COLLEGE CASE.

The only reply I have ever heard made to the proposition that the doctrine of the Dartmouth College case ceased to be the law in Illinois on August 8, 1870, so far as all laws passed after that date making grants of special privileges or immunities are concerned, and that, therefore, any ordinance heretofore passed, or hereafter to be passed, by the city council of Chicago, subsequent to the date specified, making a grant of the right to lay down and use street railroad tracks in the streets of Chicago, is alterable, amendable and repealable, or revocable, by the State Legislature, and by the city council, acting within the limits of its delegated powers, is the reply that the Supreme Court of Illinois is against the proposition (*Chicago General Railway Company v. Chicago City Railway Company*, 62 Ill. App., 502, 513, 518). Is that true?

It is true that, so far as I can find, the Supreme Court of the State has never, in words, construed and applied the aforesaid constitutional mandate that "No law making any irrevocable grant of special privileges or immunities shall be passed." But the Court has frequently construed and applied the aforesaid reservation of power in Section Nine of the General Incorporation Act of 1872. "The statute reserves to the General Assembly the power to pre-Of this section the Supreme Court of the United States has said: scribe in the government of corporations 'such regulations and provisions as it may deem advisable.' The language is very comprehensive. Regarding it alone, it is difficult to conceive what objects of legislation are not covered by it. The Supreme Court of the State has construed it to be of greater import than the usual reservation of the power to alter and amend the charters of corporations" (*Freeport Water Company v. Freeport City*, 180 U. S., 587, 596).

As above stated, while Chicago was organized under its special charter of 1863, as amended in 1867, the State Legislature passed a general act respecting the laying down and use of street railroad tracks in streets, the purpose of the act having been to carry out the policy of the State Constitution of 1870. The act is the Horse and Dummy Act, approved March 19, 1874, in force July 1, 1874, modeled upon the basis of the said special Acts of 1859, 1861 and 1865. That act, in all its substantial features, has remained in force continuously since July 1, 1874 (R. S. 1874, p. 571; Laws 1897, p. 282; Laws 1899, p. 331). That act became part and parcel of the charter of all street railroad companies formed in Illinois after August 8, 1870, and, so far as applicable

consistently with the Federal Constitution, of all street railroad companies previously formed under special charters (*Chicago Union Traction Co. v. Chicago*, 199 Ill., 484, 531-546; *West Chicago Street R. Co. v. The People*, 203 Ill., 551; 214 Ill., 1; Constitution 1870, Article IV, Section 22, Clauses 22, 23; Article XI, Sections 1, 2, 4; General Incorporation Act of 1872, Section 9, Laws 1871-2, p. 296).

That act, in its first section, authorizes street railroad companies, incorporated under the general laws of the State, to locate and construct their roads upon or over streets, "subject to the provisions contained in this act." Section two provides that no street railroad company shall have the right to locate or construct its road upon or along any street in any incorporated city "without the consent of the corporate authorities of said city;" that "said consent may be granted for any period, *not longer than twenty years*, * * * upon such terms and conditions, not inconsistent with the provisions of this act, as such corporate authorities * * * shall deem for the best interests of the public. * * *" Section four provides: "Every grant to any such company of a right to use any street, alley, road, highway or public ground, shall be subject to the right of the proper authorities *to control the use*, improvement and repair of such street, alley, road, highway or public ground, *to the same extent as if no such grant had been made*, and *to make all necessary police regulations concerning the management and operation of such railroad, whether such right is reserved in the grant or not.*"

As above stated, Chicago organized as a city under the general Cities and Villages Act, in force July 1, 1872 (Laws, 1871-2, p. 218), completing the organization on the first Monday in May, 1875, pursuant to a popular vote cast April 23, 1875. That act, copied in a large measure from Chicago's charters of 1851 and 1863, delegated to the city council in cities complete power to regulate and control the use of streets; "to permit, regulate, or prohibit the locating, constructing or laying a track for any horse railroad in any street, alley, or public place; *but such permission shall not be for a longer time than twenty years*;" "to provide for and change the location, grade and crossing of any railroad;" "to license, tax and regulate hackmen, draymen, omnibus drivers, carters, cabmen, porters, expressmen, and all others pursuing like occupations, and to prescribe their compensation;" "the city council * * * shall have no power to grant the use of, or the right to lay down, any railroad tracks in any street of the city, to any steam or horse railway company, except upon petition of the owners of the land representing more than one-half of the frontage

of the street, or so much thereof as is sought to be used for railroad purposes;" "to pass all ordinances, rules, and make all regulations, proper or necessary to carry into effect the powers granted to cities * * * with such fines or penalties as the city council * * * shall deem proper; *provided* no fine or penalty shall exceed \$200.00, and no imprisonment shall exceed six months for one offense" (Cities and Villages Act of 1872, Part 1, Article V, Section 1, Clauses 24, 25, 42, 90, 96).

In cases arising under these statutory enactments, the Supreme Court of the State has decided that the city council of Chicago has no power, in an ordinance making a grant of the right to lay down and use street railroad tracks in public streets, by irrevocable contract, to divest itself of delegated power, so far as any street railroad company organized after August 8, 1870, is concerned, to compel a street railroad company to cleanse the space between its tracks once a week (*Chicago Union Traction Co. v. Chicago*, 199 Ill., 259); to compel a street railroad company to give transfer tickets, and to regulate the rates of street railroad fares (*Union Traction Co. v. Chicago*, 199 Ill., 484); to compel a street railroad company to lower a tunnel constructed by it under the Chicago River (*West Chicago Street Railroad Co. v. The People*, 214 Ill., 1; 203 Ill., 551). It has also decided that a street railroad company organized under the General Incorporation Act of 1872 cannot acquire, by assignment from a street railroad company organized under the aforesaid special Acts of 1859, 1861 and 1865, an irrevocable right to exercise and enjoy any irrevocable right, privilege or immunity, that may have been acquired under and by virtue of those acts, if any such exist (*Chicago Union Traction Company v. Chicago*, 199 Ill., 484, 536-546).

It is true that, in the case of *West Chicago Street Railroad Company v. Chicago*, 178 Ill., 339, the State Supreme Court did decide that the city council of Chicago could, by an ordinance passed July 30, 1883, exempt the West Chicago Street Railroad Company from liability to pay a special assessment for paving a street, in consideration of a condition in the franchise ordinance that the company keep a portion of the street in repair. The ruling, however, is based solely on the authority of the case of *Chicago v. Sheldon*, 9 Wallace, 50, above considered, and, obviously, unduly extends the application of the ruling in that case. Three Justices dissented. The ruling of the Supreme Court of the United States, in *Chicago v. Sheldon*, manifestly can have no application whatever to ordinances passed subsequent to the date of the State decision in *Chicago v. Baer*, holding that the rule of equality in taxation prescribed by the State Constitution of 1848 forbade the

council of Chicago to exempt anyone from liability to pay a special assessment levied to defray the cost of a local improvement, and the decision in *Chicago v. Sheldon* left the State Supreme Court perfectly free to apply its own ruling in *Chicago v. Baer* to all ordinances passed after the date of that decision, and the State Supreme Court was bound to adhere to its own ruling to the extent stated, unless it was persuaded that its own ruling was not in harmony with the State Constitution of 1848. Besides, the State Constitution of 1870 expressly ratified and confirmed the State Court's rule of decision in *Chicago v. Baer* (Constitution of 1870, Article IX, Sections 1, 3, 6, 9, 10). The decision of the majority of the Illinois Supreme Court in *West Chicago Street Railroad Company v. Chicago*, 178 Ill., 339, was, therefore, I think, with deference, wrong, and ought to be expressly overruled.

Clearly, under the foregoing decisions of the State Supreme Court, the doctrine of the Dartmouth College case has no application to any of the usual and ordinary provisions of an ordinance passed by the city council of Chicago after August 8, 1870, making a grant of the right to lay down and use street railroad tracks in the streets of Chicago.

A provision in such an ordinance obligating Chicago to purchase the material property of the grantee, in the event of the putting into effect of the policy of the municipal ownership of street railroads, I do not class as a usual and ordinary provision. Such a provision would, I think, constitute a contract,—private in its nature,—Chicago could not avoid by a use of its delegated sovereign powers of legislation, for the same reason that Chicago cannot avoid a contract to buy one thousand tons of coal for use in the operation of its municipality owned water works plant *Walla Walla v. Walla Walla Water Co.*, 172 U. S., 17; *National Water Works Co. v. Kansas City*, 62 Fed. Rep., 853, C. C. A., per Mr. Justice Brewer).

The only question left, then, is whether the doctrine of the Dartmouth College case applies to the usual and ordinary part of such an ordinance called "the granting part," passed after August 8, 1870. Is that part of such an ordinance repealable, or revocable, by legislative act? What is the doctrine of the State Supreme Court upon this subject?

The grantee in such an ordinance does get a right of private property of such a nature that it is taxable by the State (*State Board of Equalization v. The People*, 191, Ill., 528) and that special assessments for local improvements may be levied against it (*Cicero and Proviso Street Railway Co. v. Chicago*, 176 Ill., 501). But that, obviously, for reasons already stated, has no bearing

whatever upon the question whether the granting part of the ordinance is revocable by the State otherwise than by a judicial proceeding. (But see *Los Angeles v. Los Angeles Water Co.*, 177 U. S., 558, 576; *People v. O'Brien*, 111 N. Y., 41; and see the phrase "chartered right," in *Monongahela Navigation Co. v. United States*, 148 U. S., 312, 344; see *Knoxville Water Co. v. Knoxville*, 189 U. S., 434, 438; *Carlyle v. Carlyle Water, Light and Power Co.*, 52 Ill., App., 577; *East St. Louis v. East St. Louis Gas Co.*, 98 Ill., 415.) All the interest in a street in Chicago that a street railroad company ever could get is a right to use the street (Special acts of 1859, 1861, 1865; Constitution of 1870, Article XI, Section 4; Horse and Dummy Act; *Turnpike Company v. Illinois*, 82 Ill., 174; affirmed, 96 U. S. 63). Such an ordinance does not grant a freehold (*Harlan v. R. R. Co.*, 198 Ill., 337; *R. R. Co. v. People*, 203 Ill., 551, 214 Ill., 1). Where Chicago is the owner of the fee of a street, under a statutory dedication, the city council has no power to alienate the title. And of course the council has no such power where, under a common law dedication, the fee remains in the abutting owners. And upon the vacation of a street, the fee must revert to the original dedicators, their heirs or assigns, where the dedication was statutory, and, where the dedication was at common law, the abutting owners, at the date of the vacation, take the fee freed from the public easement (*People v. Harris*, 203 Ill., 272, and cases cited Act in force July 1, 1874, Hurd's R. S., 1903, p. 1897; 5 Ill. Cyclopaedic Dig., p. 570. See *Illinois Central R. Co. v. Illinois*, 146 U. S., 387).

It was stated above that the Supreme Court of Illinois decided at the April term, 1874, that all that a street railroad company organized under the special acts of 1859, 1861 and 1865 got out of an ordinance of the common council of Chicago, passed August 22, 1864, was "but a mere license" to use a public street in Chicago, and that such ordinance did not grant "a franchise." The Court has adhered to that doctrine ever since, and it is familiar law in Illinois, popular speech in Chicago to the contrary notwithstanding, that all that any public service corporation gets out of an ordinance making a grant of the right to use a public street, passed since the decision above referred to, is a license, and not a franchise (*Chicago v. Rothschild & Co.*, 212 Ill., 590, 592, and cases cited). March 29, 1883, and again on October 31, 1889 (*City of Quincy v. Bull*, 106 Ill., 337; *Gas Co. v. Town of Lake*, 130 Ill., 42), the State Supreme Court said that such an ordinance, when accepted by the grantee, constitutes a contract between the grantee and the municipality.

Does this doctrine mean that the license, or contract, is irrevoca-

ble by legislative act? The circumstances under which the doctrine originated show, I think, that the substantive thought underlying this doctrine is, that the license, or contract, is revocable by legislative act. The case referred to, where this doctrine originated, is *Chicago City Railway Co. v. The People*, 73 Ill., 541, and, though stated *supra*, it must be re-examined here. The validity of an ordinance passed by the common council of Chicago on November 13, 1871, purporting to amend a previous ordinance, passed August 22, 1864, making a grant of the right to lay down and use street railroad tracks in Indiana avenue, and extending the time for performance, was assailed in an information in *quo warranto* filed by the Attorney General, and in a bill for an injunction filed by owners of land abutting on Indiana avenue. Counsel and Court alike assumed that the ordinance of November 13, 1871, was *invalid*, unless power to pass it could be got out of the said special acts of 1859, 1861 and 1865. Counsel also assumed that *the legal effect* of the ordinance was to make an irrevocable grant of the right, or franchise, to lay down and use street railroad tracks in Indiana avenue for ninety-nine years. On the basis of these two assumptions, the ordinance was assailed by counsel as a local or special law, granting to a corporation the right to lay down railroad tracks, or amending an existing charter for that purpose, and granting to a corporation a special privilege or franchise in contravention of Article IV, Section 22, clauses 22 and 23, of the Constitution of 1870. Apparently no other part of that Constitution was relied on. It is not possible to believe, however, that Court and counsel were all unaware of other applicable provisions in that Constitution above set forth. Two of the majority Justices, Scholfield and Craig, had been members of the Constitutional Convention that framed that Constitution, and one of the counsel for the railroad company, Mr. Hitchcock, had been its president (1 Debates in C. C. of 1870, page next after title page). The main reply of counsel to the assault made upon the ordinance was this: "A valuable franchise of the railway company lies in its power to contract with the city for the use of the streets; * * * such a grant implies an obligation not to withdraw the power, which is protected by the Constitution of the United States, and, * * * therefore, it is not competent for the people of the State, by their Constitution, to take away from the city the power to so contract with the company." Three Justices, accepting the views of counsel that the ordinance did make an irrevocable grant of a franchise, held that the State Constitution of 1870 could, and did, take away from the city power to make such a grant. Four Justices, however, held that the ordinance of August 22, 1864, was a

grant of "but a mere license," and the ordinance of November 13, 1871, was a waiver of a forfeiture of the license for failure to comply with a condition that the road be built within fifteen months after August 22, 1864, which waiver the council could make without any enabling act. The reason given for this result was, that a franchise could not emanate from the council of Chicago; it could emanate only for the State Legislature. The majority, after citing Blackstone's definition of a franchise and the New York case of *Davis v. The Mayor*, above referred to, went on and said: "It is a misconception of the law to suppose the railway company derives *its power to construct a railroad* from any ordinance of the city. All its authority is from the State and is conferred by its charter. The city has delegated to it the power to say in what manner and upon what conditions the company may exercise the franchise conferred by the State, but nothing more. * * * Whether it is in the power of the State to revoke that authority, is a question that does not arise for decision, and upon which we refrain from expressing an opinion. It is sufficient it has not been done by any provision of the Constitution, nor by any general law enacted by the Legislature." The specific thing drawn in question in the case was it should be observed, the power of the railway company *to enter upon Indiana avenue* and locate its road *there*, and not its abstract "power to construct a railroad," two widely different powers, or franchises. The majority did not affirm that the railway company got its power to enter upon Indiana avenue and locate its road there out of the act of 1859, but the majority did in words affirm that the company got its power to enter upon Indiana avenue and locate its road there from a license granted by the common council of Chicago on August 22, 1864. The reason given for saying that the ordinance did not grant a franchise, but did grant a license, namely, that a franchise must come direct from the sovereign law-making power in the State, is not, necessarily, a good one. A right to use a public street for street railroad purposes *is* a franchise when granted by the State Legislature directly (*Greenwood v. Freight Co.*, 105 U. S., 13), and such right does, indirectly at least, emanate from the State Legislature when granted by the council of Chicago under a power delegated by the Legislature (*Walla Walla v. Walla Walla Water Co.*, 172 U. S., 1, 9; *Chicago v. Baer*, 41 Ill., 306, 313; *People v. Suburban R. Co.*, 178 Ill., 594, 605; *State v. Gas Co.* 18 Ohio St., 262, 293). I think the majority decided that the trouble with the case was that the irrevocable grant of a right to use Indiana avenue for ninety-nine years, on which the whole case was founded and argued on both sides, had no existence at all; that the Attor-

ney General and the abutting land owners were attacking a wind-mill, because the so-called irrevocable franchise was "but a mere license." The majority of the court did not expressly say that the license was revocable. All they said was that no one has attempted to revoke it. But if the ruling is in any way responsive to the case as discussed at the bar, namely, on the basis that the validity of the ordinance in issue hinged upon its admitted *legal effect* as an irrevocable grant, it clearly means that the license was revocable by legislative act."*

As above stated, the Attorney General and the owners of land abutting on Indiana avenue really had no case at all. The ordinance assailed was clearly *valid*,—that is to say, the common council of Chicago had power to pass it under and by virtue of Chicago's charter of 1863, as amended in 1867,—whatever may have been the *legal effect* of the ordinance, whether it operated as a revocable or as an irrevocable contract.

In 1883, in the case of the *City of Quincy v. Bull*, 106 Ill., 337, the State Supreme Court ruled that an ordinance of the city council of Quincy, passed August 7, 1873, making a grant to certain individuals of the right to lay down and use water pipes in the streets of Quincy, became, on acceptance, a valid and binding contract, and the Court enjoined the officials of the city from enforcing an ordinance subsequently passed revoking the grant. Mr. Justice Sheldon said: "We see no more to be involved here than the simple law of contract,—whether a municipal corporation may *at its will* repudiate the obligation of a fair contract which it has made, and which it was authorized to make. The attempt is to take back a grant which the city has made under a contract. The State itself may not revoke a grant it has made. The city must be bound by the contract and grant it has made, and had authority to make, the same as would an individual," citing *Burlington v. Burlington Street Railway Company*, 49 Iowa, 144. The facts of the case, and the Iowa decision cited, make it quite plain, I think, that all the Court could affirm was, that the council of Quincy had no power to revoke the grant *at its own will and pleasure*, and that the justice of the cause of revocation is reviewable by a court. The revocation in this case, if sustained, would have left the people of Quincy without any water supply, and appears to have been an ill-considered act, doing no one any good, and injuriously af-

NOTE.

*One of the majority justices, Mr. Justice McAllister, was one of the original incorporators of the Chicago West Division Railway Company. See his opinion in *Hickey v. Chicago & W. I. R. Co.*, 6 Ill. App., 172.

fecting a large number of people. The case, I think, falls very short of holding that the city council of Quincy could not, *for any cause whatever*, revoke that water pipe grant.

In the case of *Chicago Municipal Gas Light Co. v. Town of Lake*, 130 Ill., 42, in 1889, it appears a bill was filed by the gas company on May 14, 1885, to enjoin the officials of the town, acting under authority of the town board of trustees, from preventing the laying down of gas pipes in the streets of the town under authority of an ordinance passed March 25, 1884, and accepted March 29, 1884. On May 23, 1884, the town board of trustees repealed the ordinance. Counsel for the town contended, first: "The ordinance was not a contract. It was a mere license;" and, second: "The complainant has not shown performance of the conditions imposed by the ordinance (to commence supplying gas within one year from the date of the passage of the ordinance); but even if it be assumed that a legal contract, and performance of its conditions, had been shown, the complainant has failed to establish such a case as entitles it to the writ of injunction, which is a negative specific performance of the contract." The case was decided in favor of the town on this second point advanced by counsel. The Court did, however, rule against their first point, saying: "The contract between the town and appellant being a valid and binding contract, the repealing ordinance of May 23, 1884 (two months after the passage of the ordinance), adopted by the town, was ineffectual to abrogate it, and said last mentioned ordinance was consequently null and void."

In 1894, in the case of *Belleville v. Belleville Citizens Street Railway Company*, 152 Ill., 171, the Court upheld the right of the city council of Belleville to repeal ordinances previously passed, making grants of the right to lay down and use street railroad tracks in the streets of Belleville, when it appeared the grantees had neglected persistently to keep the road in good condition and to give good service, and a power of revocation was reserved in the granting ordinance. The case does nearly, if not quite, hold that a city council has the power to revoke a grant of the right to use a public street for street railroad purposes for good and just cause. It will be remembered that the Horse and Dummy Act saves all the powers of the council of a city whether the right to use them is expressly reserved in the granting ordinance or not.

In 1901, in the case of *The People v. Central Union Telephone Co.*, 192 Ill., 307, 311, the Court said: "It is true, as said by counsel for the relator, that the grant by the city of Pontiac of the right to use the streets, etc. (made April 7, 1899), is not a franchise, but a license or contract; but it is equally clear that when

the corporation accepted the privileges and entered upon the right to use the streets, etc., it became a binding contract between the city and company, which could not be revoked or rescinded *except for cause*."

In 1904, in the case of *Chicago v. Rothschild*, 212 Ill., 590, the Court said: "The court has repeatedly held that a franchise is a privilege which emanates from the sovereign power,—that is, in a case like this, from the State,—and that the power conferred upon a railroad company, by ordinance, to locate and maintain a railroad in the streets of a city is a license, which, after the road is built, *may be* irrevocable, but that such an ordinance does not create or confer upon the railroad company constructing the railroad in the street, a franchise."

I, for one, cannot see that it is true, that the State Supreme Court is against the proposition, that the city council of Chicago has had no power, since the taking effect of the present Constitution of Illinois on August 8, 1870, to make an irrevocable grant of the right to lay down and use street railroad tracks in the streets of Chicago for a term of years. The doctrine of the Court is, I think, that the council's grant is revocable by the council *for good and just cause*; the goodness and justice of the cause being a judicial question.

XXII. THE STATE LEGISLATURE AND THE DARTMOUTH COLLEGE CASE SINCE AUGUST 8, 1870.

It would seem to be very clear from the statutes above cited that the State Legislature has never delegated any power to the council of Chicago to make irrevocable grants of street railroad franchises or licenses. The only words in any act passed by the State Legislature since August 8, 1870, that could be construed to clothe the council with that power are the words in the Cities and Villages Act of 1872, and in the Horse and Dummy Act of 1874, limiting the period of the grant to a term not exceeding twenty years. When these acts are considered in all their parts, and it is remembered that no time limitation is imposed upon municipal grants of privileges to other public service corporations, I think that is too slight a basis on which to engraft by mere implication so important a power (but see *Freeport Water Co. v. Freeport City*, 180 U. S., 587, 615; *Cleveland St. R. Case*, 194 U. S., 517, 536). Just why the State Legislature hit upon twenty years for the life of a municipal street railroad grant is not easy to make out. There is no sense underlying the limitation, if it be true, as I think it clearly is, that under the Constitution the grant is revocable by legislative act. It has been said by some one somewhere that twenty years was selected

by analogy to that section of the State Constitution which requires the principal and interest of municipal bonds to be paid within twenty years (Article 1 Sec. 12). But even if each generation of men in Chicago ought to pay the public debts they incur, it does not clearly follow that each generation of men in Chicago ought to be required to pay the cost of building the street railroads of Chicago together with a reasonable rate of interest thereon. It should be observed, that the Horse and Dummy Act of 1874 was passed while the case of the *Chicago City Railway Company v. the People*, 73 Ill., 541, was pending in the State Supreme Court. It seems not unlikely that that act was a legislative answer to the irrevocable ninety-nine year contract claim advanced in that case on behalf of the railway company, of which Mr. Justice Sheldon, for the minority, said (p. 558): "It appears to be a claim that ought not to be admitted." The twenty-year limitation may possibly have been intended only as a warning and notice to the authorities of municipal corporations that they must stop looking to special acts chartering corporations, passed before the taking effect of the Constitution of 1870, as a source of legislative power.

XXIV. THE SUPREME COURT OF THE UNITED STATES IS THE FINAL AUTHORITY ON THE QUESTION WHETHER THE DOCTRINE OF THE DARTMOUTH COLLEGE CASE HAS HAD ANY PLACE IN THE LAW OF ILLINOIS SINCE 1870, AND IS NOT NECESSARILY BOUND BY STATE DECISIONS.

But suppose the Supreme Court of Illinois has decided that, under the Constitution of 1870, and under the statutes enacted pursuant thereto, the city council of Chicago has authority to make irrevocable grants of the right to use the streets of Chicago for street railroad purposes, what of it? The final judicial authority on the question is, admittedly, the Supreme Court of the United States. In the exercise of its jurisdiction over this question that tribunal has original, independent, judicial power granted to it by the Constitution of the United States. It is in no way whatever bound by a State decision holding that such an ordinance makes an irrevocable grant or contract. The Federal Supreme Court cannot, rightfully and constitutionally, adopt such a State decision, if it is not in harmony with its own independent judgment on the question (*N. O. Waterworks Co. v. La. Sugar Ref. Co.*, 125 U. S., 18; *McCulloch v. Virginia*, 172 U. S., 102).

By a line of adjudications running back, as above stated, to the Dartmouth College case itself, the Supreme Court of the United States is irrevocably and finally committed to the doctrine that no State legislative body has the power to pass a law making a grant of powers, franchises, rights, privileges, or immunities that can operate as a contract irrevocably binding the State, acting by

its Legislature, not to alter, amend or repeal, or revoke, the grant, where, at the time of the passage of the law, the State Constitution prohibited the State Legislature from parting with any of the legislative power of the State, by a clause therein reserving power to alter, amend or repeal, or by a clause at least equivalent thereto, such as that "No law making any irrevocable grant of special privileges or immunities shall be passed." That Court has recently said that a State's reserved power to alter, amend or repeal should not be frittered away by refinements of reasoning (*Covington v. Kentucky*, 173 U. S., 231, 239). That Court also recently refused to adopt the opinion of the highest court of Kentucky holding (by reason of an inadvertent overlooking of a State statutory reservation of power to alter, amend or repeal) an exemption from taxation to be an irrevocable contract. The Federal Supreme Court said: "As we conclude that the State decision in the Bank Tax case above cited (97 Kentucky, 597) upon the question of contract was not only in conflict with the settled adjudications of this court, but also inconsistent with sound principle, we will not adopt its conclusions" (*Citizen's Savings Bank v. Owensboro*, 173 U. S., 636, 648).

XXV. THE POSITION OF THE SUPREME COURT OF THE UNITED STATES ON THE QUESTION OF THE APPLICATION OF THE DARTMOUTH COLLEGE CASE IN ILLINOIS SINCE AUGUST 8, 1870.

In the Water Rate cases that went up to the Supreme Court of the United States on writs of error to the Supreme Court of Illinois the general question was whether municipal ordinances regulating water rates, passed by cities and villages in Illinois under and pursuant to the Illinois Water Rate Act of 1891, impaired the obligation of contracts evidenced by municipal ordinances passed prior to 1891 but subsequent to the taking effect of the Illinois Constitution on August 8, 1870, making grants of the right to lay down and use water pipes in public streets, the grantees being in one case individuals, but subsequently organized as a corporation under the Illinois General Incorporation Act of 1872, and in other cases corporations organized under that act, the said granting ordinances containing provisions fixing the water rates to be charged. The Supreme Court of the United States, by a majority of one vote, sustained the ordinances passed after 1891 reducing water rates previously fixed in the franchise or license ordinances, on the ground that the municipalities had no power by delegation from the State Legislature to bind themselves and the State Legislature by irrevocable contract not to regulate water rates (Illinois Water Rate cases, 180 U. S., 587, 619, 624). But Mr. Justice McKenna, speaking for the majority, said (180 U. S., 593): "It is not

clear from the opinion of the (Illinois) Court whether it intended to decide that municipal corporations could not be invested with power to bind themselves by irrevocable contract not to regulate water rates. If so, we cannot concur in that view. We have decided to the contrary many times, and very lately in *Los Angeles v. Los Angeles City Water Co.*, 1900, 177 U. S., 558. See also *Walla Walla v. Walla Walla Water Co.*, 172 U. S., 1, 7, where the subject is more extensively discussed and the cases reviewed. See also *New Orleans Water Co. v. Rivers*, 115 U. S., 674. *WE do not mean to say that if it was the declared policy of the State that the power of alienation of a governmental function did not exist, a subsequently asserted contract would not be controlled by such policy.*" The attention of the Court was not, however, directed to that provision of the Constitution of Illinois of 1870 which says that: "No law making any irrevocable grant of special privileges or immunities shall be passed," which, as I think, effectually declared the policy of Illinois to be, for the future, that the power of alienation of a governmental function does not exist in Illinois. Had the Court's attention been directed to this prohibition, it seems certain that the Court would have unanimously affirmed the judgments of the Supreme Court of Illinois upon a line of reasoning widely different from what appears in the majority and minority opinions. Mr. Justice White, for the minority, said (180 U. S., 607): "In logical sequence, the questions which arise are these: Was there power in the Legislature to confer upon the municipality authority to contract for water for public use and fix by (irrevocable) contract the rates to be paid by the city for a stated period? * * * *It is not even intimated in the opinion below that there was an express limitation in the Constitution of the State of Illinois restricting the power of the Legislature to authorize a municipality to contract for water for public use for a fixed period, and to agree upon the rates to be paid therefor for such time.*"

In several instances recently, however, where the question was whether an ordinance of a municipal legislative body sitting under the Legislature of a State impaired the obligation of a contract evidenced by provisions in a previous ordinance making a grant to a public service corporation of the right to use streets, the Supreme Court of the United States has appeared to ignore State Constitutions and statutes reserving power to alter, amend or repeal. One explanation appears to be that counsel did not rely upon the State Constitution or statutes reserving such power. The Detroit and Cleveland Street Railroad Rate Cases, though they affirmatively hold that the city councils of Detroit and Cleveland could make irre-

vocable contracts binding themselves and the State Legislatures of their respective States not to regulate street railroad rates, only mean, I think, that the city councils of Detroit and Cleveland had no power by delegation from the State Legislature to fix street railroad rates, otherwise than by way of a condition in an ordinance making a grant of the right to use streets. In both cases, the State Constitution in force at the date of the passage of the ordinances relied on as irrevocable contracts reserved power to alter, amend or repeal (Detroit Case, 184 U. S., 368; Cleveland Case, 194 U. S., 517; see Knoxville Case, 189 U. S., 434). In the Walla Walla Case, 172 U. S., 1, the contract evidenced by the ordinance and drawn in question in the case was a contract by the city to buy the water plant of the company,—a contract not affected, I think, as above stated, either by the reservation of power to repeal or by the prohibition to make irrevocable grants in the Constitution of the State of Washington. The ordinance relied on as an irrevocable contract was passed March 15, 1887, while Washington was organized as a territory of the United States. The ordinance assailed as impairing the alleged irrevocable contract was passed June 10, 1893. Washington was admitted into the Union as a State in 1889. The question of the power of Congress to delegate power to the government of a territory to make irrevocable contracts, under the doctrine of the Dartmouth College case, was not considered, nor was the question whether the admitted State was irrevocably bound by such contracts made as a territory of the United States, when the State Constitution adopted on becoming a State is against irrevocable contracts. The Los Angeles Water Rate Case, 177 U. S., 558, holding that the city council of Los Angeles could, and did, on July 22, 1868, bind itself by irrevocable contract not to use the powers subsequently derived from the State Constitution of 1879 and an act of the State Legislature passed in 1881 to regulate water rates is, I think, with all due deference, wrong, because the State Constitution in force July 22, 1868, expressly reserved power to amend or repeal charters of corporations. The decision seems directly at variance with the decision of the same Court in the case of *Spring Valley Water Works v. Schottler*, 110 U. S., 347 (61 Cal., 3, 18), overlooked apparently by Court and counsel, unless the circumstance in the Los Angeles Case that the provision fixing rates in 1868 is found in a *lease* of the City's own water works to individuals, who at once transferred the lease to a corporation, is sufficient to reconcile the two decisions, and I cannot see how it can be.

The opinion in this Los Angeles Case suggests the possibility of an extension by the Federal Supreme Court of the rule in

Gelpcke v. Dubuque, above stated as having been applied in *Chicago v. Sheldon*, to a new subject. The same possibility is slightly hinted in the *Cleveland Street Railroad Case* (194 U. S., 517, 594). The question suggested is this: If the Supreme Court of Illinois, in the face of State constitutional and statutory prohibitions, has ruled that an ordinance of the council of Chicago making a grant of the right to lay down and use street railroad tracks in the streets of Chicago, becomes, when accepted by the grantee, an irrevocable contract or grant, under the doctrine of the *Dartmouth College* case, will the Supreme Court of the United States hold all such ordinances, passed and accepted while such ruling of the Supreme Court of the State stood unreversed, to be irrevocable contracts or grants, although that ruling of the Supreme Court of the State is admittedly inconsistent with very many rulings of the Supreme Court of the United States itself?

An authoritative affirmative answer to this question would evidently involve a complete abdication of a part of its constitutional functions by the Supreme Court of the United States. Surely its function as an independent judicial tribunal is not *to decline to adopt* State decisions *refusing to find* irrevocable contracts or grants, and *to adopt* without question all State decisions *finding* them in manifest disregard of the plain meaning, settled by itself, of language, suggested by itself, used in a State Constitution or a State statute (See the dissenting opinion of Mr. Justice Miller in *Washington University v. Rouse*, 8 Wall., 439, 441). The reason for the rule in *Gelpcke v. Dubuque*, to wit: The acquisition of rights of private property presumably on the faith of the decision of the highest court of a State expounding a State Constitution and State statutes cannot possibly apply where the highest court of the State renders a decision directly contrary to a doctrine, established at the time of the State decision, of the Supreme Court of the United States. The letter and spirit of the rule in *Gelpcke v. Dubuque* ought to require men to read and to rely solely upon the settled adjudications of the Supreme Court of the United States alone expounding the legislative power of a State to make irrevocable contracts under the obligation of contracts clause of the Federal Constitution. Upon those decisions as they stand at a given time, and upon those alone, can men rightfully be permitted to rely in their dealings with State and municipal governments (The case of *Gelpcke v. Dubuque*, 4 Har. Law Rev., 311; *Bank v. Owensboro*, 173 U. S., 636, 648).

Is there anything in the Los Angeles case really against this view? An examination of the case will show that there is not.

In that case it appeared that on July 22, 1868, the city council

of Los Angeles leased its municipally owned water works to certain individuals for thirty years, granted the right to extend the works, and reserved the right to regulate the rates to be charged for water, "Provided they shall not so reduce such water rates or so fix the price thereof as to be less than those now charged." * * *

In August, 1868, the lessees and grantees organized a corporation under the laws of California by the name of the Los Angeles City Water Company. April 2, 1870, the Legislature of California confirmed the lease and grant of July 22, 1868. The Constitution of the State in force on said dates provided that "corporations may be formed under general laws, but shall not be created by special act except for municipal purposes. *All general laws and special acts passed pursuant to this section may be altered from time to time or repealed.*" A new State Constitution took effect in 1879, which retained said provision of the earlier Constitution (California Constitution of 1879, Article 1, Sec. 21; Art. XI, Sec. 19). Article XIV of the new Constitution of 1879 expressly provided that city councils should have power to regulate water rates, and on March 9, 1881, the State Legislature passed an act to enable city councils to regulate water rates. February 23, 1897, the council of Los Angeles passed an ordinance reducing water rates below the rates charged July 22, 1868. This ordinance of 1897 was held void as impairing the obligation of the provision respecting water rates in the lease and grant made in 1868. The question whether, under and by force of the above quoted words in italics in the State Constitution in force July 22, 1868, such ordinance *could be* an irrevocable contract, was not considered very much, if at all. Counsel for the city did contend that "the city did not have power to bind the State," to which the court replied: "The contention as expressed is very comprehensive and seems to deny the competency of the State to give the city the power to bind it. We do not, however, understand counsel as so contending, nor *could they*. *Walla Walla v. Walla Walla Water Co.*, 172 U. S., 1; see also *People v. Stephens*, 62 Cal., 209. (But see *Spring Valley Water Works v. Schottler*, 110 U. S., 347; *Spring Valley Water Works v. San Francisco*, 61 Cal., 3, 18; which say counsel could, and should, so contend). We understand the argument to be that the power, if not expressly given, will not be presumed unless necessarily or fairly implied in or incident to other powers expressly given, not simply convenient but indispensable to them. * * * The rule is familiar." The Court said that the rule did not apply to the case in hand, because the State Legislature ratified the acts and ordinances of 1868 on April 2, 1870. Then this act of April 2, 1870, was assailed as being repugnant to the

first part of the above set forth provision of the State Constitution in force in 1870, because "the act of 1870 conferred franchises on the company *by a special act instead of by a general law*, and thereby infringes the constitutional provision, and against the existence of such power in the Legislature the following (California) cases are cited." The Court then said that under the decisions of the highest court of California, as they stood on April 12, 1870, the State Legislature did have power to confer franchises on the water company *by a special act*. But whether the franchises were *revocable or irrevocable*, in view of the expressly reserved power to repeal, was not expressly considered by the Court or argued by counsel. Then the Court said: "It follows, therefore, that at the time of the contract of 1868 and of the passage of the ratifying act of 1870 it was established by the decisions of the highest court of the State that the Constitution of the State permitted a grant of special franchises to persons and corporations, and permitted the latter to receive assignments of them from such persons or grants of them directly from the Legislature. This law was part of the contract of 1868, as confirmed by the act of 1870, and could not be affected by subsequent decisions." But the reserved power to alter and repeal also "was a part of the contract of 1868, as confirmed by the act of 1870." A grant of a *revocable* franchise by a *special* law is one thing, and a grant of an *irrevocable* franchise by a *special* law is another and different thing. The Court does not say that, nor did it enquire whether, under the State decisions, as they stood in 1870, the State Legislature of California could either directly, or indirectly by a grant of power to a municipal corporation, make a grant of an irrevocable franchise, and, hence, obviously, it is not, and could not have been, judicially affirmed in this case that the Supreme Court of the United States would follow such State decisions, if they exist, rather than its own decisions to the contrary.

The Los Angeles case is, therefore, no authority at all in favor of extending the doctrine of *Gelpcke v. Dubuque* so as to make it the rule for the decision of a case involving the question whether a State Legislature has the power to make, or to authorize a municipal corporation to make, an irrevocable contract or grant bestowing an irrevocable franchise, when the State Constitution, in the mode and manner pointed out to the people by the Supreme Court of the United States itself, forbids it so to do. Nor do I see how the *Cleveland Street Railroad Rate Case*, 194 U. S., 517, 594, can be so regarded, when the learned Justice who wrote the opinion in that case, Mr. Justice White, dissented in *Muehlker v. Harlem Railroad*, 197 U. S., 544, where that doctrine was ex-

tended to a new subject, and apparently expressed, or hints, a contrary view in the Owensboro Case, 173 U. S., 636.

In the last analysis, the cases above referred to in the Federal Supreme Court and many others involving the same questions to be found in the reports of the highest courts of States rest upon the proposition,—no doubt quite generally accepted in these days outside of courts,—that State Legislatures are incompetent and untrustworthy, if not actually dishonest. But that would seem to be a proposition for the electors to deal with, rather than a rule of decision for the courts. "Some play must be allowed for the joints of the machine, and it must be remembered that legislatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts" (Mr. Justice Holmes, in *Missouri, K. & T. R. Co. v. May*, 194 U. S., 267, 270). "Under no system can the power of courts go far to save a people from ruin; our chief protection lies elsewhere" (James B. Thayer, "The Origin and Scope of the American Doctrine of Constitutional Law," 7 Har. Law Rev., 129, 156).

It seems to me, that the decisions of the Supreme Court of the United States have settled the proposition that, under the Illinois Constitution of 1870, and statutes passed pursuant thereto, the city council of Chicago has no power to pass an ordinance making an irrevocable grant of the right to lay down and use street railroad tracks in the streets of Chicago for a fixed period of time, and, if it be true, and I think it is *not true*, that the Supreme Court of Illinois is against that proposition, that makes no difference whatever, because the Supreme Court of Illinois has no commission to set aside the State Constitution under which it sits, and, if it has done so, it is, in the instance in hand, the duty of the Supreme Court of the United States to give effect to the State Constitution as it was written and adopted by the people of the State, agreeably to that Court's own suggestion as to how to write it in order to get a certain legal result.

XXVI. THE NEW YORK CASE OF PEOPLE V. O'BRIEN.

The judicial authority most relied on to support that proposition that, under the Constitution of 1870, a twenty-year street railroad franchise or license to use streets in Chicago is irrevocable by legislative act before the expiration of the twenty years, is the judgment of the New York Court of Appeals in *People v. O'Brien*, 111 N. Y., 1. In that case Jacob Sharp and his associates finally did get street car tracks irrevocably laid down in Broadway, New York city. In that case the New York Court of Appeals decided that an act of the Legislature of New York, passed pursuant to a reserved power in the State Constitution to

alter, amend and repeal charters of corporations, revoking all the powers, privileges, franchises, rights and immunities of The Broadway Surface Railroad Company had no effect, except to take away the bare power of the corporation to live, or to exist, and that, as applied to the right of the corporation to lay down and use street railroad tracks in Broadway obtained from the common council of New York city, the act was void as an impairment of the obligation of contracts, and as a taking of private property without due process of law. The reserved power to alter and repeal was in the State Constitution in force at the time the corporation got its charter from the State, and at the time it got its right to use Broadway from the city of New York.

In so far as the ruling in this case is predicated upon the circumstance, that, at the time of the passage of the act of repeal or revocation, the corporation had outstanding mortgages, bonds, and stocks, traffic agreements with other street railroad corporations, construction and equipment contracts and other merely private contracts, it is manifestly wrong, because it is plainly apparent that men cannot, by entering into contracts with each other, divest a State or the National Legislature of its legislative power of altering or revoking grants of special privileges (*Greenwood v. Freight Co.*, 103 U. S., 13; *Knoxville Water Co. v. Knoxville*, 189 U. S., 434, 438; *Buffalo East Side R. Co. v. Buffalo Street R. Co.*, 111 N. Y., 132).

In so far as the case rules that under the law of New York as it stood at the time in question (May to December 5, 1884) a grant by the local government of New York city to a corporation of the right to lay down and use street railroad tracks in a street in that city stands upon the same footing as a grant of an acre of land made by a State (*Fletcher v. Peck*, 6 Cranch, 87), or a grant made by a farmer to a railroad company of a strip of land for a right of way across his farm, the decision may be binding upon the people of the city of New York, but that case is no evidence at all of what the law is in Illinois, or in any other State in the Union. The Supreme Court of the United States has ruled, that an act of the Legislature of Massachusetts making a grant of the right to lay down and use street railroad tracks in a street in Boston, subject to a reserved power to alter or repeal, is not in the same class of acts as the act of a farmer making a grant of a strip of land across his farm. The latter is but an exercise by an individual of his natural and inalienable right to sell his own private property for money. The former act is an exercise by the supreme legislative body of a State of the sovereign law-making power of the State, making a grant of a portion of its sovereign

power to a street railroad company *in trust*, to be used for the ultimate benefit of the people for the use of which power the grantee is at all times accountable to the legislative grantor, and the grantee must lay down the power, or stop using it, whenever the legislative grantor so wills, and must no longer encumber the streets with its material property, its rails and road bed, when the Legislature so wills by an act revoking the grant and authorizing a new corporation to construct and operate a street railroad right over the same ground (*Greenwood v. Freight Co.*, 103 U. S., 105).

That is, I think, the true conception of the act of the city council of Chicago when, under the Constitution of 1870, it passes an ordinance making a grant of the right to lay down and use street railroad tracks in a street in Chicago (*City of Belleville v. Citizens' Street R. Co.*, 152 Ill., 171). At least, it has got to be demonstrated that the judgment of the Supreme Court of the United States, and the opinion of Mr. Justice Miller, in the case cited, are wrong, before the conceptions of the personal pronouns mine and thine, as applied to a public street and the right to use it for street railroad purposes, under the doctrine of the Dartmouth College case and under a State's reserved legislative power to alter and repeal, incorporated into the law of New York by the decision in *People v. O'Brien*, 111 N. Y., 1, can get a permanent abiding place in the existing law of Illinois (With Mr. Justice Miller's opinion compare Burke's exposition of the English phrase "Chartered Rights of Men," quoted in 8 Am. Law Rev., 226, and in 1 Ohio St., 634).

XXVII. THE STREET RAILROAD TANGLE IN CHICAGO ARISES OUT OF A MISAPPREHENSION OF THE LAW OF ILLINOIS.

It results from the aforesaid views that the street railroad war in Chicago is based upon a wrong legal opinion,—the legal opinion that the doctrine of the Dartmouth College case is now, and has been since August 16, 1858, a rule of law in Illinois applicable to the street railroad corporations of Chicago, and, consequently, that an ordinance making a grant of the right to lay down and use street railroad tracks in the streets of Chicago always did, and does now, grant special privileges irrevocable by legislative act. In other words, the whole war is based upon the idea that irrevocability by legislative act is a necessary ingredient of a franchise. That it is not is clear. The source of the error is probably the ninety-nine year limitation in the act of 1865, and the twenty-year limitation in the Cities and Villages Act of 1872, and in the Horse and Dummy Act of 1874. That twenty-year limitation is not at all in harmony with the policy of the Constitution of 1870, in so far as it declares against irrevocable grants of

special privileges. A just legislative carrying out of that policy requires that no maximum term of years at all be specified; that the grantees be allowed to hold, exercise and enjoy their privileges just as the Judges both of the Supreme and inferior Courts of the United States hold their offices, that is to say, "during good behavior." If experience in Chicago has demonstrated anything, it has demonstrated that the street railroad business cannot be, or will not be, carried on honestly under twenty-year grants. Human nature being what it is, men who go into that business will get their money back within the twenty years, either by an excessive rate of fare for bad service, or by selling over-issues of stocks and bonds to investors,—innocent very often in fact if not in law. As above stated, under our law, the operation and management of a street railroad by individuals and corporations is a trust. "And it is of the very essence of every trust to be rendered *accountable*, and even totally to *cease*, when it substantially varies from the purposes for which alone it could have a lawful existence. This, I conceive, sir, to be true of trusts of power vested in the highest hands, and of such as seem to hold of no human creature. But about the application of this principle to subordinate derivative trusts, I do not see how a controversy can be maintained" (Burke's speech, *supra*). The Constitution of Illinois of 1870, and the statutes of Illinois prior and subsequent to 1870 make the private owners and operators of street railroads in Chicago accountable to the local government of Chicago. Has Chicago ever had a local government that adequately and justly performed its functions in this regard?

XXVIII. REVOCABLE LICENSES UNDER THE LAW OF ILLINOIS AND MUNICIPAL OWNERSHIP.

It also results that outstanding, unexpired ninety-nine and twenty-year grants of street railroad franchises or licenses to use the streets of Chicago present no real obstacle to a change, at any time, from the governmental policy of private ownership to the governmental policy of public ownership of street railroads in Chicago. I do not see how any court, without unpermissible legislation of its own economic views into our written Constitutions, could rule that a municipal legislative revocation of such outstanding, unexpired grants, made with a view to give effect to a popular vote in favor of such change, was not based upon what the law deems a good and just cause. Of course, after such revocation, the local government of Chicago could not be compelled to pay a dollar for such franchises or licenses to use the streets. One might as well affirm that a private landlord, after exercising his reserved right to put an end to a lease, could not

enter and use the premises covered by the lease without paying the tenant the value of the use of the premises for the *unexpired* term of years subsequent to the date of revocation. Of course, the local government would have to pay the grantee of the revoked franchise or license for its material property, if it wanted to take it and to use it (*City of Belleville v. Belleville Street R. Co.*, 152 Ill., 171, 188; *Bridge Co. v. United States*, 105 U. S., 470; *Monongahela Nav. Co. v. U. S.*, 148 U. S., 312).

XXIX. THE MUELLER MUNICIPAL OWNERSHIP LAW.

But does it now, or at any definitely assignable date in the future, lie in the power of the people of Chicago, however much they may desire it, to change from the established policy of the State, giving the local government of Chicago complete, sovereign governmental control over the operation and management of street railroads in the streets of Chicago, to the policy of municipal ownership and operation of them? The only act delegating power to Chicago to own and operate street railroads is the so-called Mueller Act, approved May 18, 1903, in force July 1, 1903 (Ses. Laws, 1903, page 285).

That act gives the city council power to construct new street railroads, or to buy ready made ones, if the council can find the cash money. But the act recognizes that the council of Chicago cannot, until there is a revolution in the administration of our tax laws, find the cash money by a use of its taxing power, and that resort must be had to its borrowing power. Two modes of borrowing money are prescribed. The first mode—an issue of bonds under authority of a two-thirds popular vote—may be laid to one side because, under existing tax laws and their administration, Chicago has quite reached the constitutional limit of its power to borrow money by a sale of bonds. The second mode seeks to enable a municipal corporation to avail itself of the familiar practice under which men have astonished all by acquiring railroads without spending any of their own money. It provides a form of security denominated “street railway certificates.” These may be issued to an amount equal to the cost of a street railroad *to be* constructed new, or *to be* bought ready made, plus ten per cent. of such cost. In no event can these certificates become a personal liability of Chicago to be paid by general taxation. They are payable only out of a particular specified fund, namely, the earnings of the street railroads to be constructed or bought. To secure payment of the certificates, Chicago is authorized to pledge by way of deed of trust, or by way of mortgage, the street railroads to be constructed, or to be bought, with the certificates or with the proceeds of them. The act then pro-

vides: "Any such mortgage or deed of trust may carry the grant of a privilege or right to maintain and operate the street railway property covered thereby for a period not exceeding twenty years from and after the date such property may come into the possession of any person or corporation as the result of foreclosure proceedings, which privilege or right may fix the rates of fare which the person or corporation securing the same as the result of foreclosure proceedings shall be entitled to charge in the operation of said property for a period not exceeding twenty years. * * *

At a foreclosure sale the mortgagee or the holders of such certificates may become the purchaser or purchasers of the property and the rights and privileges sold, if he or they be the highest bidders."

Very plainly, I think, all that is a clear attempt to delegate power to Chicago to make an irrevocable grant of the right to operate a street railroad in the streets of Chicago for twenty years, and to charge a rate of fare irrevocably fixed for twenty years. Is the grant made revocable by this sentence following directly after the above quotation: "Any street railways acquired under any such foreclosure shall be subject *to regulation* by the corporate authorities of the city *to the same extent as if the right to construct, maintain and operate such property had been acquired through a direct grant*, without the intervention of foreclosure proceedings"? In view of the object aimed at, the raising of money and the giving of security for repayment, in view of the source from which the mode of raising money was borrowed, and in view of the rate-fixing provisions, I do not think the last words quoted can fairly and reasonably be interpreted as a reservation of power to repeal the grant. Apt words for this purpose being at hand, I do not see how any court can say that the reserved power to prescribe "regulations" for street railways in the Mueller Act is tantamount to a reserved power to alter and repeal the grant of the right to use streets, and the grant of the right to charge a fixed rate of fare for a fixed term of years (*Detroit v. Detroit Citizens Street R. Co.*, 184 U. S., 368, 383-385.) This view is somewhat supported by the fact that the aforesaid clause reserving power was taken from the fourth section of the Horse and Dummy Act, omitting the following very material words in that section, to wit: "to make all necessary *police regulations* concerning the *management and operation* of such railroad, whether such right is reserved in the grant or not." I incline to think, therefore, that the part of the Mueller Act referred to encounters the State constitutional prohibition against the making of irrevocable grants of special privileges, and is, therefore, void.

The act also provides that street railway certificates can be issued only on approval of a *majority* of the qualified voters of Chicago, voting on the question. Suppose such approval given, certificates issued, and new street railroads constructed, or old ones bought, by Chicago. What can Chicago do with them? The act says Chicago must *lease* them, unless authorized to operate them by her own officers and employees by *three-fifths* of the electors voting on the question. The lease authorized to be made includes not only the material street railroad property acquired and owned by Chicago, but the intangible "franchise." The act says: "In case of the leasing by any city of any street railway owned by it, the rental reserved shall be based on both the actual value of the tangible property and of *the franchise contained in such lease*, and such rental shall not be less than a sufficient sum to meet the annual interest upon all outstanding * * * street railway certificates issued by such city on account of such street railway." What is "*the franchise contained in such lease*"? The intent was, it seems to me, that the lease should operate as an irrevocable grant of "*the franchise contained in such lease*" for the fixed term of years specified. It seems impossible to construe the words "lease," "grant," and "franchise," in connection with the whole act, considered in all its parts, otherwise than as meaning irrevocable lease, grant or franchise. This part of the act, therefore, also encounters the State Constitution, and is void.

In so far as the act authorizes Chicago to acquire the material property of an existing street railroad company by a use of the power of eminent domain, before the required three-fifths vote to operate has been obtained, it seems difficult indeed to sustain the act. If it be conceded that the government of a State may lawfully use its power of eminent domain to acquire the property of an existing street railroad corporation, with a view to operating it immediately by its own officers and employees (*In re Brooklyn*, 26 L. R. A., 270), and even if it be conceded that a State government may use its power of eminent domain to re-invest itself with powers of legislation of which it had previously been deprived by irrevocable contracts, under the doctrine of the Dartmouth College Case, I do not see how it is possible for a State government lawfully to use its power of eminent domain to acquire the material property of one street railroad corporation at a time when all that the government can do with the property when acquired is, first, to mortgage the material property, the mortgage containing a covenant binding the government to give the mortgagees an irrevocable grant of the right to use the streets of Chicago, and an irrevocable grant of the right to charge an

irrevocably fixed street railroad rate of fare, and, second, to lease the property so mortgaged to another street railroad corporation for identically the same use. It would appear to be clear, that a resort to the power of eminent domain, under the act, would be premature and unconstitutional, at least until the three-fifths vote to operate is obtained. It is too clear for discussion that the government cannot use its power of eminent domain merely to bring about a change in the private ownership of private property (*Cary Library v. Bliss*, 151 Mass., 304).

But if the aforesaid provisions of the Mueller Act be stricken out, it may be that the remainder can stand, and, if so, the act does give the local government of Chicago power *to acquire* street railroads, provided it can raise the cash money to pay for them, and power *to operate* them with its own officers and employes, provided the necessary three-fifths vote is forthcoming.

But it ought not to be forgotten that municipal ownership and municipal operation of street railroads are not in themselves ends for which the local government of Chicago was ordained and established. They are but governmental means for attaining a more ultimate end,—the only end a government can rightfully aim to attain in dealing with street railroads,—to wit: the security and protection of the individual in the exercise and enjoyment of his right of person and of property to reasonably comfortable rides in street cars over and along the streets upon payment of a reasonable rate of fare (See the Declaration of Independence, Second Paragraph). There being little doubt that the local government of Chicago is not now, and is not likely to be for some time, in a position to avail itself of the means of municipal ownership and municipal operation to attain that end, should the available means be neglected, namely, the granting of revocable licenses to private individuals or corporations, and the passage of reasonable and just ordinances showing them “the way wherein they must walk,” and holding them to a strict account of their trust? I do not see how it is possible, under the law of Illinois, by a use of those means, to prejudice the just rights of all those who are convinced in their own minds that our political safety requires a change from the policy of private ownership of street railroads to the policy of governmental ownership. The greatest obstacle to that change,—outstanding franchises made irrevocable by legislative act by the doctrine of the Dartmouth College Case,—does not exist, and certainly no one supposes that any government ought ever to attempt to acquire the material property that goes to make a street railroad without money, or the means of raising money, to pay for it.

In my judgment, the Supreme Court of the State should be given an opportunity at the earliest possible moment to declare the meaning of the mandate in the Constitution that "No law making any irrevocable grant of special privileges or immunities shall be passed," and if it means what the men who wrote it intended, then the General Assembly ought, first, to revise the Horse and Dummy Act by at least striking out the words "not exceeding twenty years," and, second, to harmonize the Mueller Municipal Ownership Law with the cardinal principle that, within the limitations of our written Constitutions, the successful majority in a fair, stand-up fight must be permitted to rule.

It does look very much as if, in disregard of the law of Illinois as evidenced by the State Constitution, State statutes and decisions of the highest court of the State, and of the United States, the people of Chicago have been immolated for eight years upon the altars of those twin rival fetishes,—so far as the present law of Illinois is concerned,—the doctrine of the Dartmouth College case, and the abstract principle and policy of municipal ownership.

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